SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 429

THE TRAVELERS PROTECTIVE ASSOCIATION OF AMERICA, PETITIONER,

vs.

ULUETTA PRINSEN

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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a [Caption omitted]

[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

Pleas and proceedings before the Honorable Tillman D. Johnson, Judge of the United States District Court for the District of Utah, presiding, in the following-entitled cause:

Law. No. 12831

ULUETTA PRINSEN, Plaintiff,

vs.

THE TRAVELERS PROTECTIVE ASSOCIATION OF AMERICA, a Corporation, Defendant

IN DISTRICT COURT OF STATE OF UTAH

COMPLAINT—Filed in State Court Nov. 24, 1931; filed in D. C. U. S., Dec. 28, 1931

Comes now the plaintiff above named and for cause of action against the defendant complains and alleges as follows, to-wit:

I

That the defendant, The Travelers Protective Association of America, is now and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Missouri, with principal place of business at St. Louis, Missouri, and authorized to do, and doing business in the State of Utah, as a foreign fraternal benefit society.

II

That on the 13th day of October, 1915, the defendant, for a valuable consideration, made, executed and delivered to James Prinsen, its certificate of membership No. 133665; that by the terms of said certificate defendant certified and agreed that the said James Prinsen was a member of said

defendant association and was entitled to such benefits as might be provided in and by the constitution, by-laws and articles of incorporation of said association, in force and effect at the time any accident occurred from which a claim for benefits arose, and that in case of death the said benefits [fol. 2] should be payable to plaintiff, the wife of said James Prinsen; that it was further agreed by the terms of said certificate and by the provisions of the constitution, by-laws and articles of incorporation of said defendant, that whenever a member in good standing and subject to the conditions, provisions and limitations of said constitution and amendments thereto should, through external, violent and accidental means, receive bodily injuries which, within six months next following the date of said accident, result in death of such member, his beneficiary should be entitled on account of such death and subject to the conditions, provisions and limitations of said constitution and amendments thereto, to receive the sum of Five Thousand ($5,000.00) Dollars; that said certificate, and the terms and conditions of the constitution, by-laws, articles of incorporation, and amendments of said defendant association, as above alleged, were in full force and effect at the time hereinafter mentioned, and that at said times plaintiff was and ever since the 15th day of October, 1915, had been, the wife of said James Prinsen and the beneficiary named in said certificate of membership and entitled in case of the death of the said James Prinsen, to the benefits thereunder.

III

That on the 3rd day of February, 1931, at or near, Cudahy Lane, Davis County, State of Utah, a railroad train, then and there owned, operated and controlled by the Denver & Rio Grande Western Railroad Company, a corporation, collided with an automobile in which the said James Prinsen was riding, causing bodily injuries to the said James Prinsen and which injuries resulted in his death on said day; that the collision between said train and the automobile in which the said James Prinsen was riding was violent and accidental and that the bodily injuries received by the said James Prinsen, as the consequence of said collision, independently of all other causes, solely and exclusively caused and resulted in his death.

IV

That at the time of the death of the said James Prinsen as aforesaid, he was, and ever since the 13th day of October, 1915, had been a member in good standing of the defendant association, and that there is no condition, exception or lim-[fol. 3] itation contained in the certificate, constitution, by-laws or articles of incorporation of said defendant association or of any amendments thereto which abridge, qualify or limit the right of plaintiff to receive the death benefit as hereinabove alleged.

V

That said membership certificate further provides that in case of the death of such member the beneficiary shall notify the secretary of said defendant association in writing within thirty days after such accident giving full particulars of the same and the name of the attending physician or surgeon; that in accordance therewith plaintiff, the beneficiary named in said certificate and within thirty days from the date of said accident, notified the secretary of said defendant association, at the office of said association at St. Louis, Missouri, of such accident in writing, giving full particulars of the same and the name of the attending physician and otherwise fully performed all of the terms and conditions of said membership certificate upon her part to be done and performed.

VI

That notwithstanding all of the matters and things hereinabove alleged and notwithstanding that plaintiff has made repeated demands upon said defendant, the said defendant has failed, refused and neglected and still does fail, refuse and neglect to pay said death benefit to plaintiff; that there is now due, owing and unpaid from defendant to plaintiff the sum of Five Thousand ($5,000.00) Dollars, together with interest thereon at the rate of eight per cent per annum since the 3rd day of February, 1931, no part nor parts of which has been paid.

Wherefore, plaintiff prays judgment against defendant for the sum of Five Thousand ($5,000.00) Dollars, together with interest thereon at the rate of eight per cent per annum

since the 3rd day of February, 1931, until paid, and for her costs herein incurred.

Harley W. Gustin, Peterson & Clark, Attorneys for Plaintiff.

[fol. 4] Duly verified.

[File endorsements omitted.]

IN DISTRICT COURT OF STATE OF UTAH

PETITION FOR REMOVAL—Filed Dec. 1, 1931

Now comes your petitioner, the above-named defendant, and appearing solely for the purpose of this motion and for no other purpose, files this its Petition for the removal of the above-entitled cause to the District Court of the United States for the Central Division of Utah, and respectfully shows to the court that this is a civil action at law, filed in the District Court of the Third Judicial District in and for Salt Lake County, State of Utah, being an action brought by the above-named plaintiff against the above-named defendant upon a contract of insurance, in which action the plaintiff seeks to recover from said defendant for the alleged death, from alleged accidental means, independently of all other causes, of the assured named in said certificate; that the controversy in said cause is wholly between citizens of different States; that the plaintiff was at the time of the commencement of said suit, ever since has been and still is a citizen of the State of Utah and a resident of said State, and that the defendant was at the time of the commencement of said suit, ever since has been and still is a corporation organized under the laws of the State of Missouri, a citizen of said State, a resident of said State and a nonresident of the State of Utah; and that the matter and amount in dispute in said cause exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars ($3,000.00). And your petitioner further shows that the time within which said defendant is required by the laws of the State of Utah and by the rules of this court to answer or plead in said cause has not yet expired.

And your petitioner offers herewith a bond of good and sufficient surety for its entering into the District Court of

the United States for the Central Division of Utah, within [fol. 5] thirty (30) days of the date of the filing of this petition, a certified copy of the record in said cause and for paying all costs that may be awarded by said District Court if said court shall hold that this cause was wrongfully or improperly removed thereto.

Wherefore, your petitioner prays this Honorable Court to proceed no further herein except to make the order of removal required by law and to approve said surety and bond and to cause the record herein to be removed into the said District Court of the United States for the Central Division of the State of Utah.

The Travelers Protective Association of America, by T. S. Logan, Secretary. Bagley, Judd & Ray, Attorneys for Petitioner. (Corporate Seal.)

[File endorsement omitted.]

IN DISTRICT COURT OF STATE OF UTAH

ORDER FOR REMOVAL—Filed Dec. 12, 1931

The defendant herein, The Travelers Protective Association of America, having filed its petition in due time and form for removal of this cause to the District Court of the United States, in and for the District of Utah, and also having filed a bond in the sum of $500.00 conditioned as provided by law, with good and sufficient sureties, and it appearing to the court that the above titled action should be removed to the said District Court of the United States, as prayed in said petition, and that the aforesaid bond is good and sufficient;

Now, Therefore, it is Ordered, Adjudged And Decreed that said bond be accepted and approved and that the above entitled cause be, and it is hereby, removed to said District Court of the United States, in and for the District of Utah, and the clerk of this court is hereby directed to prepare and certify a transcript of the record herein to be entered in the

[fol. 6] said United States District Court, and that no further proceedings be had herein in this cause in this court.

Done in open court this 12th day of December, 1931.

David W. Moffat, Judge.

Attest:

Alonzo Mackay, Clerk, by Fred C. Bassett, Deputy Clerk. (Seal.)

[File endorsement omitted.]

RECITAL AS TO BOND

[Bond on removal in the sum of $500, with defendant as principal and Fidelity and Deposit Company of Maryland as surety, was filed in the Third Judicial District Court, State of Utah, on Dec. 1, 1931.]

[fol. 7] IN UNITED STATES DISTRICT COURT

ANSWER—Filed Jan. 20, 1932

Comes now the above named defendant The Travelers Protective Association of America, and for answer to the complaint of plaintiff on file herein admits, denies and alleges:

1. Admits and alleges that this defendant is, and was at all times mentioned in plaintiff's complaint, a fraternal beneficiary association without capital stock, duly organized and existing as such under the laws of the State of Missouri relating to fraternal beneficiary associations, and has been and is duly authorized and licensed by the Commissioner of Insurance of that and other states, including the State of Utah, to do business as a fraternal beneficial society. That said Association was and is operated solely for the mutual benefit of its members and their beneficiaries and not for profit, having a lodge system with ritualistic form of work and representative form of government, and makes provision for the payment of benefits to the class of persons designated by law in case of death or injury resulting from accidental means independently of all other

causes, subject to the exceptions, limitations and conditions set out in the Constitution and By-Laws of the Association and subject to compliance therewith by its members and their beneficiaries. That said Association is operated and has always been operated for the sole benefit of its members and their beneficiaries, and that such is and always has been its sole object and purpose. That incident thereto, it issues and has issued to its members benefit certificates, the amount payable thereunder being derived from the proceeds of its regular semi-annual dues or assessments of all the members of the Association. That those eligible to membership in said Association were and are commercial travelers in good standing and buyers and sellers in wholesale trade. That defendant's Articles of Association and Charter provide that the main purpose and object of this Association is to bring about better acquaintance and a more fraternal and binding feeling between persons engaged in the business of commercial travelers and the business of selling merchandise at wholesale, and to that end to secure from all transportation companies and hotels just and reasonable rates for commercial travelers as a class.

2. This defendant admits and alleges that heretofore James Prinsen made application to become a member of the [fol. 8] defendant Association and was thereafter duly admitted to membership and a certificate of membership was executed, issued and delivered by the defendant to said James Prinsen under date of October 13, 1915, bearing No. 133665. That by said certificate of membership so issued to said James Prinsen it was and is provided that the application of James Prinsen, the certificate of membership, the Articles of Incorporation of the defendant, and its Constitution and By-Laws, and all amendments thereto, in force and effect at the time of the event alleged to have given rise to a claim for benefits, constitute the contract between the defendant and said James Prinsen and should govern and control the payment of benefits thereunder. That said James Prinsen, by said certificate and said other instruments, did agree and contract with this defendant that said instrument should constitute the contract between said James Prinsen and defendant and should determine and control all payments of all benefits. That the Constitution of this defendant in force at the time such certificate was issued to said James Prinsen, ever since that time, and at

the present time, provided and provides that the right to death benefits does not exist in all cases but only in such cases as do not fall within the limitations, conditions and exemptions of the provisions of the Constitution. That by said application and said certificate said James Prinsen did agree to all of said provisions and the same became a part of the contract entered into between him and this defendant as aforesaid.

3. Admits and alleges that on the 3rd day of February, 1931, at or near Cudahy Lane, Davis County, State of Utah, a railroad train owned and operated by the Denver & Rio Grande Western Railroad Company, collided with an automobile truck loaded with explosive substance or substances, to-wit, a large number of dynamite caps, on which truck said James Prinsen was at the time riding, and had been riding, for the purpose of aiding and participating in the delivery and/or moving and/or transportation of said dynamite caps and/or other explosive substances, and said James Prinsen was killed in the explosion resulting from said collision between said train and said truck carrying said dynamite caps.

4. This defendant denies each and every other allegation, matter or thing in plaintiff's complaint contained not hereinbefore or hereinafter admitted, modified or denied.

5. Further answering said complaint, and as its separate [fol. 9] and additional defense thereto, this defendant alleges that under and by the express terms and provisions of the certificate issued to said James Prinsen and the Articles of Incorporation, Constitution and By-Laws of this defendant, and each of them, in full force at all times mentioned in plaintiff's complaint, it was expressly provided, among other things, that this defendant Association shall not be liable to the member, or his beneficiary in case of injuries, fatal or otherwise, "when a member is participating * * * in the moving or transportation of gunpowder, dynamite or other explosive substance or substances"; and this defendant alleges that by reason of the foregoing provision of said instruments said James Prinsen did contract with this defendant that neither he nor his beneficiary named in such certificate should under any circumstances have any right or rights under said contract on account of fatal injuries inflicted or suffered when and while par-

ticipating in the moving or transportation of gunpowder, dynamite or other explosive substance or substances; and this defendant alleges that the death of said James Prinsen was directly and proximately caused by reason of the fact that he was on said automobile truck and came into collision with said train when and while he was participating in the moving and transportation of said load of dynamite caps; and this defendant alleges that on account of the foregoing matters plaintiff is not entitled to any benefit or benefits whatsoever from this defendant under said contract growing out of the death of said James Prinsen as aforesaid.

6. Further answering said complaint, and as its separate and additional defense thereto, this defendant alleges that the said Certificate, Articles of Incorporation, Constitution and By-Laws of this defendant, and each of them, in force at all times mentioned in plaintiff's complaint, expressly provided and provide that there shall be no liability on the defendant Association when the death of the member is "the result of voluntary or unnecessary exposure to danger or to obvious *risk* of injury." And this defendant alleges that by reason of the foregoing provision of said instruments said James Prinsen did contract with this defendant that neither he nor his beneficiary named in such certificate should under any circumstances have any right or rights under said contract on account of injuries, fatal or otherwise, when and if the death of said James Prinsen [fol. 10] should result from his voluntarily or unnecessarily exposing himself to danger or to obvious risk of injury; and in this connection this defendant alleges that the death of said James Prinsen was the result of his voluntarily and unnecessarily exposing himself to danger and obvious risk of injury in riding upon said automobile truck loaded with dynamite caps as aforesaid, and in heedlessly, negligently, voluntarily, and unnecessarily allowing said automobile truck so loaded with said dynamite caps to be driven onto said railroad track in front of a rapidly moving train approaching thereon which was then and there in plain sight and which said James Prinsen, by the exercise of the slightest care on his part, could have both seen and heard in ample *time* to have caused said automobile so loaded with dynamite caps to be stopped before entering upon said track in front of said train.

7. Further answering said complaint, and as its separate and additional defense thereto, this defendant denies that it ever executed or delivered to said James Prinsen any certificate other than the certificate alleged and described in this answer; and this defendant denies that it ever executed or delivered to said James Prinsen any contract other than the contract described in this answer; and this defendant alleges that it never executed or delivered to said James Prinsen any certificate other than the certificate referred to in this answer and never executed or delivered to said James Prinsen any contract other than the contract as in this answer alleged, and never entered into any contract with said James Prinsen other than the contract described in this answer.

Wherefore, having fully answered, defendant prays that plaintiff take nothing by her complaint herein and that it be dismissed and have and recover its costs.

Bagley, Judd & Ray, Attorneys for Defendant.

Duly verified.

Received copy of foregoing Answer this 20th day of January, 1932.

Peterson & Clark, Harley W. Gustin, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 11] IN UNITED STATES DISTRICT COURT

REPLY—Filed June 1, 1932

Comes now the plaintiff above named and for reply to defendant's answer heretofore filed herein admits, denies and alleges as follows:

I.

Denies that at the time of the injury to the said James Prinsen, as alleged in plaintiff's complaint on file herein, the said James Prinsen was aiding or participating in the delivery and/or moving and/or transportation of dynamite caps, gunpowder, dynamite or any explosive substance or substances, or that the said James Prinsen was killed as a result of the explosion of any dynamite caps,

gunpowder, dynamite or any explosive substance or substances.

II

Denies that the death of the said James Prinsen, as alleged in plaintiff's complaint on file herein, was directly or proximately caused by participation in the moving or transportation of dynamite caps or that the said James Prinsen, at the time of the injury alleged in plaintiff's complaint, was participating or aiding in the moving, delivery or transportation of dynamite caps or any explosive substance or substances.

III

Denies that at the time of the injury alleged in plaintiff's complaint the said James Prinsen voluntarily and/or unnecessarily exposed himself to danger or obvious risk of injury in riding upon an automobile truck loaded with dynamite caps or otherwise, or that he heedlessly, negligently, voluntarily or unnecessarily allowed the automobile, in which he was riding at the time of said injury, as alleged in said complaint, to be driven onto or upon any railroad track in front of a rapid moving train approaching thereon, or otherwise, and denies that any railroad train at said time and place was then and there in plain sight or could be seen and heard by the said James Prinsen, and denies that said automobile could be stopped before entering upon any railroad track in front of any railroad train as alleged in defendant's answer on file herein.

IV

For further reply to defendant's answer on file herein plaintiff alleges that the said James Prinsen, at the time [fol. 12] and place of the injury alleged in the complaint on file herein, was riding in and upon the automobile struck by the railroad train as alleged in said complaint, as an invitee and/or guest and not otherwise, and that the said James Prinsen was not operating said automobile nor did he have any control in the operation or running thereof.

V

For further reply to defendant's answer on file herein plaintiff alleges that the policy of insurance mentioned

and described in plaintiff's complaint on file herein was made, executed and delivered to the said James Prinsen, by defendant with full knowledge and upon the understanding and agreement that the said James Prinsen was employed as a powder salesman by the Western Powder Company, a Utah corporation, which was then and there engaged in the handling, purchase, sale and distribution of dynamite caps, gunpowder and dynamite.

VI

Denies generally each affirmative allegation contained in defendant's answer not herein specifically admitted, modified or denied.

Wherefore plaintiff having fully replied to defendant's answer on file herein prays that said answer be taken for naught and that she have the relief prayed for in her complaint on file herein.

Peterson & Clark, Harley W. Gustin, Attorneys for Plaintiff.

Duly verified.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER DIRECTING VERDICT—June 1, 1932

At this 1st day of June, 1932, come plaintiff by H. W. Gustin and D. W. Clark, her attorneys, and defendant by E. M. Bagley, its attorney, also comes. And this cause coming on regularly for trial thereupon comes a jury to-wit: Lawrence Manning, J. A. Haigh, Fred W. Chambers, R. L. Mitchell, Ben Willougby, Ezra Brown, John H. Peterson, John V. Rouche, Archie Farr, Hyrum Christen- [fol. 13] sen, E. C. Hogan and R. W. Morgan, twelve good and lawful men and they are duly empaneled and sworn to well and truly try this cause and a true verdict render according to the evidence. And certain stipulations were made by counsel and certain documentary evidence introduced and plaintiff rests. And on the part of defendant C. R. Fitzgerald was sworn and examined as a witness and

defendant rests. And the motion of defendant for a directed verdict—no cause of action was argued by counsel and by the court sustained and said jurors by direction of the court returned the following verdict to-wit:

"We, the jury duly empaneled and sworn in the above entitled cause find the issues joined in favor of the defendant, The Travelers Protective Association of America and against the plaintiff, Uluetta Prinsen—'No cause of Action,' by direction of the court. R. W. Morgan, Foreman."

Wherefore, it is ordered and adjudged by the court that plaintiff, Uluetta Prinsen, take nothing by her complaint herein and that defendant recover of and from plaintiff its costs herein incurred to be taxed upon a verified cost bill and have execution therefor.

IN UNITED STATES DISTRICT COURT

VERDICT—Filed June 1, 1932

We, the jury, duly empaneled and sworn in the above entitled cause find the issues joined in favor of the defendant The Travelers Protective Association of America and against the plaintiff Uluetta Prinsen—"No cause of Action," by direction of the court.

R. W. Morgan, Foreman.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

JUDGMENT—June 1, 1932

At this 1st day of June, 1932, the same being a juridical day of the April Term, 1932, Central Division of said court, present, Honorable Tillman D. Johnson, Judge, plaintiff appearing by H. W. Gustin and D. W. Clark, her attorneys, and defendant by E. M. Bagley, its attorney, also appearing, and this cause coming on regularly for trial by a jury of twelve good and lawful men were duly

empaneled and sworn to well and truly try this cause and [fol. 14] a true verdict render according to the evidence. And the jurors having heard the evidence, thereupon defendant moved the court for a directed verdict—no cause of action—and the court having heard the arguments of counsel sustained said motion, whereupon jurors by direction of the court returned the following verdict, to-wit:

"We, the jury, duly empaneled and sworn in the above entitled cause find the issues joined in favor of the defendant, The Travelers Protective Association of America, a corporation, and against the plaintiff, Uluetta Prinsen 'No cause of action,' by direction of the court. R. W. Morgan, Foreman."

Wherefore, it is ordered and adjudged by the court that plaintiff, Uluetta Prinsen, take nothing by her complaint herein and that defendant recover of and from plaintiff its costs herein incurred to be taxed upon a verified cost bill and have execution therefor.

In United States District Court

Bill of Exceptions—Filed July 12, 1932

Be It Remembered that on the 1st day of June, 1932, the above entitled cause came on for trial before Honorable Tillman D. Johnson, judge of said court, sitting with a jury, the plaintiff appearing by Harley W. Gustin and D. Worth Clark, her attorneys, and the defendant by E. M. Bagley, its attorney.

Whereupon the following proceedings were had:

(A jury of twelve good and lawful men were duly called, examined, chosen and sworn herein.)

Plaintiff's Exhibit A, the same being the Certificate of Membership or so-called insurance policy involved herein and referred to in plaintiff's complaint, was offered and received in evidence, the same reading as follows:

Plaintiff's Exhibit "A"

T.P.A. T.P.A.

The Travelers Protective Association of America

A Fraternal Benefit Society Incorporated. Under the laws of the State of Missouri. By this Certificate of Mem-

bership Certifies That James Prinsen, of Salt Lake City, [fol. 15] Utah, is a member of said The Travelers Protective Association of America, and is entitled to such benefits as may be provided in and by the Constitution, By-Laws and Articles of Incorporation of said Association, in force and effect at the time any accident occurs from which a claim for benefits arises. Benefits in case of death payable to Ulnetta Prinsen, his wife. This Certificate, the Constitution, By-Laws and Articles of Incorporation of said Association and application for Membership, signed by said member and all amendments thereto shall constitute the agreement between said Association and said member, and shall govern the payment of benefits and any changes, additions or amendments to said Constitution, By-Laws or Articles of Incorporation, hereafter duly made shall bind said member and his beneficiary or beneficiaries, and shall govern and control the contract in all respects the same as though such changes, additions or amendments had been made prior to, and were in force at the time of said member's application for membership.

In Witness Whereof, this Association has caused this Certificate to be signed by its President and Secretary under the seal of the Association at St. Louis, Mo., this 13th day of October, A. D. 1915. No. 133665.

C. F. Tomlinson, President. T. S. Logan, Secretary. (Seal.)

T.P.A. T.P.A.

(In red printing across face of the above appears the following:)

Any member meeting with an accident must notify the National Secretary in writing within thirty days of such accident, giving full particulars of same and name of attending physician. In case of death the beneficiary shall give such notice. In case of failure to notify except because of unconsciousness or physical inability the member or his beneficiaries shall forfeit all rights to insurance benefits.

(Reverse side is as follows:)

The following benefits are paid subject to the conditions, exceptions and limitations of the Constitution of the Association and amendments thereto, whenever a member in

good standing shall, independently of all other causes, [fol. 16] through external, violent and accidental means, receive bodily injuries which shall solely and exclusively cause death or disability:

1. $10,000 if killed by accident while riding as a passenger inside a passenger car on a passenger train, propelled by steam. 2. $5,000 if killed by accident. 3. $5,000 for the accidental loss of both legs or both arms by severance. 4. $2,500 for the accidental loss of one hand or one foot by severance above wrist or ankle. 5. $1,300 in case of accidental loss of four fingers of either hand by severance. 6. $5,000 in case of accidental loss of both eyes. 7. $1,250 in case of accidental loss of one eye. 8. $25 per week for total disability, from accident, not exceeding 104 weeks. 9. $12.50 per week for partial disability following total disability, from accident, not exceeding five weeks.

Change of Beneficiary

I hereby direct that the beneficiary named in the within certificate be changed to —— ——, whose relation to me is —. (Certificate cannot be made payable to Estate or Executor.) First or given name of beneficiary must be in full, and agree to accept the Articles of Association, Constitution, By-Laws, and all Amendments to each as existing at this date and as hereafter adopted.

Dated at —— on the — day of ——, 191-.

—— ——, Signature of member named in this certificate.

Witness: One witness sign here: —— ——.

If change of beneficiary is desired, please fill out the above blank and mail to The National Secretary, at St. Louis, Mo.

Sec. 9. Any member in good standing wishing a new certificate or change of beneficiary may have said certificate issued or beneficiary changed by surrendering his certificate then in force and paying to the National Secretary a fee of 50 cents (said fee to be credited to expense fund), except that in the event of death of beneficiary or marriage of a member, this charge is remitted.

[fol. 17] No. 133665. Certificate of Membership in the Travelers Protective Association of America, St. Louis,

Mo. Issued to J. Prinsen, Salt Lake City, Utah Division.

In case of injury, fatal or disabling, immediately notify the Secretary of the Travelers Protective Association, at St. Louis, Mo.

(In ink:) Ex. A.

Plaintiff's Exhibit A-1 was then received in evidence the same being the envelope enclosing the insurance policy (Exhibit A) the material portions of which are as follows:

PLAINTIFF'S EXHIBIT "A-1"

Notice of Accident

Sec. 8. Any member in good standing meeting with any accident, as described in this article, must notify the National Secretary in writing within thirty days, giving full particulars of same and name of attending physician. In case of death the beneficiary shall give such notice within thirty days. In case of failure to notify, except because of unconsciousness or physical inability, the member, or his beneficiary in case of death, shall forfeit all rights to insurance benefits. Sec. 8, Art. 9, Constitution. * * * In case of injury, fatal or disabling, notify the Secretary of the Travelers Protective Association, within thirty days at St. Louis.

Plaintiff's Exhibit B, the same being Statement of the Beneficiary and Proof and Notice of Loss, was then introduced in evidence and reads as follows:

PLAINTIFF'S EXHIBIT "B"

T.P.A.

The Travelers Protective Association of America,
St. Louis, Missouri

Statement of Beneficiary

In the matter of Estate of James Prinsen, late of Salt Lake City.

1. My full name and address are Uluetta C. Prinsen, 958 East 1st So., Salt Lake City. 2. My relationship to

deceased is that of wife. 3. His exact age 56 years 3 months 14 days. Height 5 ft. 7 in. Weight about 155. [fol. 18] 4. Exact date and place of death—Feb. 3 - 1931, Salt Lake City. 5 My own personal knowledge of the accident in question is as follows: (If necessary use additional sheets to answer this question and to give facts derived from others.) My first notification of the accident that resulted in the death of my husband, James Prinsen, was a telephone communication of a Newspaper Reporter from the Salt Lake Telegram. 6. The names and addresses of the eye-witnesses are: J. O. McClury, Farmington, Utah; Dale Shulthies, Woods Cross, Utah; W. E. James, 1228 So. 5th East, Salt Lake City (See newspaper clipping enclosed.) 7. What sicknesses or diseases did deceased have during the past five years and what was the state of his health at the time? Perfectly well and had no sickness of any kind was in perfect health. 8. What physicians at any time treated him for said diseases or for any physical or mental ailment or disorder? (Give names and present addresses.) Had no occasion to consult any physician in the last five years. 9. In what manner was deceased affected by the injury at the time it was inflicted? Death resulted immediately from the accident. 10. At what time after the injury was physician called? Dr. J. J. Galligan was called immediately. 11. What instructions and treatment did the physician give? Not any. 12. Was deceased ever unconscious or delirious as a res-lt of an injury or other cause? Never. 13. What other accident insurance did deceased carry at the time of his death? (State amounts and names of Companies or Associations and dates of Insurance.) No other. 14. If he carr-ed any Life or Health Insurance (or both), state amounts, dates, names of Companies or Associations. About $14,500.00 in New York Life Insurance Co. 15. Give names of any Life, Health or Accident Companies or Associations that rejected him or cancelled his insurance. None. 16. In what occupation was he engaged at the time of his death? Mgr. Western Powder Co. 17. State fully what were all of his duties in his occupation? General duties as manager largely office management. 18. What was his average monthly income? Monthly salary $400.00. 19. At what places had deceased lived before locating in, Pocatello, Idaho & St. Paul, Minn. 20. To what extent did he use

intoxicating liquors or drugs? None at all at any time. 21. Had he partaken of intoxicants within 24 hours of his injury? No. 22. Has any one else any kind of interest in your claim against this Association? If so, state their interest and give their names and addresses. No. 23. Was [fol. 19] deceased ever injured prior to the time in question? No. If so, state when and how; how long disabled, and whether he received indemnity from any accident insurance or transportation company. 24. If he ever received any indemnity or benefits from any Health Insurance Company, lodge or Association for accident or sickness, state amounts and names of Companies. No. 25. What visible marks or signs of injury resulting from the accident in question did you at any time observe on body of deceased? (Describe them fully.) I was not allowed to see the remains. 26. According to your information and belief, what other causes in addition to the alleged injury contributed to the death of deceased. The accident was the sole cause of his death.

By furnishing this blank and investigating the claim I agree that the Association shall not be held to admit the validity of any claim or waive any of the provisions of its Constitution or any defense it may have.

I hereby warrant *that* the statements in this and all of the other certificates herein to be strictly true and made in good faith.

(Signed) Uluetta C. Prinsen, Beneficiary.

STATE OF UTAH,
County of Salt Lake:

Sworn to and subscribed by the above-named beneficiary before me *me* this 2nd day of March, 1931.

Name of Official: Homer Holmgren; Title: Notary Public; P. O. Address: Salt Lake City, Utah. (Seal.)

Form 36 5C 8-28.

(Reverse side as follows:)

The Travelers Protective Association of America. Proofs of the Death of James Prinsen of Salt Lake City, Utah, who died on the 3rd day of Feb., 1931. Certificate No. 133665 and 67742, Division Utah. Post A Check No.

—. Claim No. —. Paid. Amount Paid, $—. T. S. Logan, Secretary, 3755 Lindell Boul., St. Louis, Mo.

(In ink:) Ex. B.

[fol. 20] The Court: Any other Exhibits? Any exhibits you want?

Mr. Bagley: Yes, I would like to follow. (Defendant's Exhibits Nos. 1, 2 and 3 were thereupon marked by the reporter.)

Mr. Gustin: We object to the offer of Defendant's Exhibits 1 and 2 on the ground——

Mr. Bagley: We offer in evidence what have been marked for identification Defendant's Exhibits 1 and 2; they are the two other sheets of the proof of loss, the first of which plaintiff offered in evidence as Exhibit B, the whole constituting the proof of loss as submitted by Mrs. Prinsen to the Travelers Protective Association as her proofs of loss under the By-Laws of the organization.

Mr. Gustin: We object on the ground that both exhibits are hearsay, and the plaintiff is not bound by them, and they are not a part of the proof of loss or notice claimed.

The Court: Objection will be overruled; I will pass upon it and give them their legal effect later.

Mr. Gustin: Exception.

Defendant's Exhibit 1 received in evidence over plaintiff's objection as aforesaid purporting to be the statement of the attending physician reads as follows:

DEFENDANT'S EXHIBIT 1

T.P.A.

The Travelers Protective Association of America,
St. Louis, Missouri

Attending Physician's Statement

(This entire Certificate must be in the handwriting of the physician.)

In the Evidence of the Claim of James Prinsen, Late of Salt Lake, Ut.

1. What are your name and address in full? John J. Galligan, Judge Bldg., Salt Lake City, Utah. 2. Are you

now and for how long have you been engaged in the practice of your profession? Yes. 19 years. 3. When and where did you graduate? Creighton Univ. 1912. 4. How long had you been personally acquainted with deceased? Three years. 5. Was he ever, to your knowledge or belief, rejected for life, accident or health insurance? No. 6. Did [fol. 21] you at any time prior to this attend him for an accidental injury? No. 7. Give the names of any other physicians who ever treated him at this or any other time? Do not know. 8. When were you first consulted or called in this case? Febr. 3, 1931. 9. Where did you first attend him? ——. 10. Were you his regular medical attendant? Yes. 11. Did you make any examination of deceased's person? Yes. 12. Had deceased any mental or physical defect of any kind? No. 13. What, if any, external or visible signs did you find of injury, caused by violent and accidental means? Extensive mutilation of head, arms & body. 14. What was the precise nature of the injury and its extent? Collision between train and truckload of dynamite caps. 15. Was the deceased, to your knowledge, afflicted with any sickness or disease, acute or chronic, at the time? No. If so, what was its nature and to what extent did it contribute to his death? None. 16. Was the deceased under the influence of liquor at the time of your first visit? No. 17. Was he ever, to your knowledge, addicted to the use of stimulants? If so, to what extent. No. 18. What local and constitutional symptoms existed after the injury and what treatment did you adopt? None. 19. State what medicine or anaesthetics you administered or surgical operations you performed. None. 20. What caused, in your opinion, operated to produce death or contributed thereto? Blown to pieces. 21. If an autopsy or post-mortem examination of the body was made, state result. None, as body was mutilated beyond examination. 22. What was the date of his death? Febr. 3, 1931. 23. What do you know directly and personally of the alleged accidental injury? As above. 24. To what extent, if any, was his eyesight or hearing impaired? No. 25. Give all other information you have in regard to the alleged injury, physical condition of deceased at that time, causes of death, etc. (1) Patient in excellent health, prior to death. (2) Inquest return- verdict of accidental death. 26. If you or any other physician treated him medically or surgically

before this time, state when, for what troubles and the treatment given. No other. 27. To what extent, if any, was death attributable thereto or to his physical condition? No connection.

NOTE.—If any other physicians were employed, their certificates must be obtained.

The attending physician will describe the nature of his patient's illness; what local and constitutional symptoms [fol. 22] existed and what treatment was adopted. If a post-mortem examination was made or a coroner's inquest held, a certified copy of the testimony, findings and verdict must be attached.

(Signed) John J. Galligan, Attending Physician.

Dated at Salt Lake this 28 day of Febr., 1931.

Form 355cl—29.

(Rubber stamp across face as follows:) Received Mar. 6, 1931. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, National office.

Defendant's Exhibit 2 received in evidence over plaintiff's objection as aforesaid purporting to be statement of an eyewitness and certificate of clergyman, undertaker and employer reads as follows:

DEFENDANT'S EXHIBIT 2

T.P.A.

The Travelers Protective Association of America,
St. Louis, Missouri

Affidavit of an Eye-Witness

In the Matter of the Death of James Prinsen, Late of Salt Lake City, Who was Injured About 2:38 P. M. on the Third Day of February, 1931

My name is William E. James. My address 1228 S-5 East.

1. How long had you known the deceased? Never. 2. Where were you and what were you doing when he met

with the accident?" Left side of Locomotive attending duties as fireman. 3. Where was he when he met with the accident? Supposed to be on motor truck. 4. What was he doing at the time? Don's know. 5. Was he to any extent at all under the influence of liquor or had he partaken of intoxicants within 12 hours? Don't know. 6. Were any persons other than yourself and deceased present at the time he was injured? If so, give their full names and addresses? Late Engineer—B. J. Rugg—Ogden, Utah. 7. State fully how the accident occurred? (Give all details.) At time of accident which resulted in death of James Prinsen & two other men—I was acting as fireman on the D. & R. G. W. R. R. passenger Locomotive involved in the accident, on train #3 going north from Salt Lake City. My only recollection of the event is that [fol. 23] as the train neared the Cudahy Packing crossing at North Salt Lake, I saw a truck approaching from the west & supposed safe would stop before getting on track.—Almost immediately a collision & explosion occurred which resulted in the death of Engineer at my side & myself becoming totally unconscious. This is all I know of the accident. 8. What relation, if any, are you to deceased? None. 9. What is your occupation? Locomotive Engineman.

(Signed) William E. James, Eye-Witness.

STATE OF UTAH,
County of Salt Lake, ss:

Subscribed and sworn to before me by the above named eye-witness, this 3 day of March, A. D. 1931. Name of Official and Title: Homer Holmgren, Notary Public. Post Office Address: Salt Lake City, Utah. (Seal.)

Certificate of the Clergyman

(Relates to Identity of Person Deceased)

STATE OF UTAH,
County of Salt Lake, ss:

I, Elmer I. Goshen of Salt Lake City being duly sworn, depose and say that I, on Sixth day of February, 1931, officiated as Clergyman at the interment of James Prinsen, late

of Salt Lake City, known by me to be the identical person described in the foregoing affidavit and statement.

(Signed) Elmer I. Goshen, Clergyman, Pastor of the First Congregational Church.

Subscribed and sworn to before me this 2 day of March, A. D. 1931. Name of Official and Title: Homer Holmgren, Notary Public. Post Office address: Salt Lake City, Utah.

Certificate of the Undertaker

(Relates to Identity of Person Buried)

STATE OF ——,
County of ——, ss:

I, Clyde Early of Salt Lake City, U- being duly sworn, depose and say that I am an undertaker at Salt Lake City, U- and that I, on Feby. 6th, interred the dead body of James Prinsen late of Salt Lake City, U- at Mt. Olivet Cem- [fol. 24] etery, Salt Lake City, known by me to be the identical person described in the foregoing affidavit and statement. Date of his birth Nov. 19, 1874.

(Signed) Clyde Early, Undertaker.

Subscribed and sworn to before me this 2nd day of March, A. D. 1931. Name and Title of Official: Homer Holmgren, Notary Public. Postoffice address: Salt Lake City, Utah. (Seal.)

Certificate of Employer

1. State what you know of the accident. Nothing from personal experience. 2. Have you read the statement of the Eye-Witness? Yes. 3. Do you, of your own personal knowledge, know that the deceased was injured (or killed) as result of the accident therein described? Yes. 4. On what date did the accident occur? February 3, 1931. 5. Do you know that the deceased was the person injured under the Certificate described? Yes. 6. What was his employment at the time he was injured? Asst. Secretary & Directors. 1. State fully the nature of his duties. General office & occasional visit to magazine. 8. What was he doing when injured? On occasional visit to magazine.

(Signed) "Edgar G. Gibson."

My official position is President & Director. My Post Office address is Salt Lake City, Utah, Box 1404. Dated this third day of March, 1931. If deceased has no employer, this blank must be executed by some reputable citizen who was personally acquainted with him.

Defendant's Exhibit 3 was then offered and received in evidence the same being a copy of the Articles of Incorporation and By-Laws of the defendant corporation in force at the time of the death of the said James Prinsen, the portions of which, so far as may be material to this controversy, are as follows:

DEFENDANT'S EXHIBIT 3

Classes of Members

Sec. 1. There shall be three classes of active members in this Association to be known as Class A, Class B, and Class C members. All members holding certificates of membership in this Association other than Class B or Class C certificates, shall be known as Class A members. Class A and Class C members shall have the same qualifications.

[fol. 25] Sec. 3. Whenever a Class A member in good standing and subject to the conditions, provisions and limitations of this Constitution and Amendments thereto shall, through external, violent and accidental means, receive bodily injuries which, within six months next following the date of said accident, result in the death of said member, his beneficiary shall be entitled on account of such death and subject to the conditions, provisions and limitations of this Constitution and Amendments thereto, to receive $5,000.

Article XII

Exceptions and Provisions Relating to Class A, B, and C Members and Their Beneficiaries

Section 1. This Association shall not be liable to a member or his beneficiary for any disability benefits, special loss benefits or death beenfits, when the disability, special loss, or death of a member occurs under any of the following conditions or circumstances: * * * when or while

a member is acting as an aviator or balloonist or is participating in aerial navigation or aeronautics of any kind either as a passenger, operator or assistant, when a member is participating * * * in the moving or transportation of gun-powder, dynamite, or other explosive substance or substances; * * * when the result of voluntary or unnecessary exposure to danger or to obvious risk of injury;

Plaintiff's Exhibit C was thereupon offered and received in evidence the same being the application of the said James Prinsen for insurance in the defendant company with letter attached. The portions of the application, so far as may be material to this controversy, are as follows:

PLAINTIFF'S EXHIBIT "C"

Application for Membership in the Travelers Protective Association of America

Office: Syndicate Trust Building, 915 Olive Street, St. Louis, Mo.

Any white male person of good moral character not under the age of 18 years or over 55 years, actively engaged in one of the following occupations, namely: Traveling or city salesman, buyer, seller, creditman for a wholesale house or firm engaged in a commercial business of a legitimate nature, or a buyer or seller, in the wholesale trade, or manu- [fol. 26] facturer selling to dealers, to be sold against, or selling to mercantile establishments to be used in their business including commission houses and manufacturers, or wholesale dealer, including commission merchants, importers and manufacturers, traveling adjusters for mercantile companies, traveling auditors for wholesale and manufacturing houses, also Presidents, Directors, Treasurers, Secretaries, Department Managers, of manufacturing or wholesale concerns shall be eligible to membership in this Association.

An applicant must be actually identified with the operating or management of the business with which he is connected. Merely owning stock or bonds of a business does not constitute in itself being 'actively engaged' in such business.

Applications must be accompanied with membership fee and dues as set forth in table on front page of application blank. The annual dues are $11.00, payable either annually or semi-annually, in advance, without notice—January 1st and July 1st.

Objects.—1st. To secure the repeal of all Municipal, County, State or Territorial laws imposing or enforcing a license tax on Commercial travelers. 2nd. To secure recognition from Railroads, and obtain as favorable terms on transportation and baggage as are given to any other class of travelers, and to adjust all differences between Railroads and Commercial Travelers on a fair, equitable business basis. 3rd. To secure hotel accom-dations commensurate with price paid. 4th. To elevate the social and moral character of Commercial Travelers as a profession, and to bring about the better acquaintances of members. 5th. To provide a benefit fund in case of death by accident or injury by accident. 6th. To secure business connections for unemployed members.

I, James Prinsen being desirous of becoming a member of the Travelers Protective Association of America, enclose herewith a membership fee of $2.00, and $— due for — months, and do warrant the following statement to be full, complete and true, and agree that the same shall be the basis of my contract of membership with said Association.

Benefits

$5,000 In case of Death by Accident. $5,000 Loss of Both Eyes by Accident. $5,000 Loss of both Legs or both Arms by Accident. $2,500 Loss of one Hand or one Foot by Acci- [fol. 27] dent. $1,300 Loss of four fingers on either hand by Severance. $1,250 Loss of one Eye by Accident. $25.00 Weekly Indemnity not to exceed 104 wks. in case of Total Disability from accident. $12.50 Per week partial disability following total disability not to exceed five wks.

1. Name in Full: —— ——. (Not Initials.) Age: 40 yrs. Height: 5 ft. 7¾ in. Weight: 150 lbs. 2. (Street and Number:) #203 Mecklenburg Apa. E. S. Temple, Residence: Town, Salt Lake City, State of Utah. 3. Address where you desire mail sent: Same. 4. Name of firm represented by you: Western Powder Co. 5. Location of firm (Street and Number): Room 306 Dooly Bldg., (Town) Salt Lake City, State of Ut. 6. Are they actively in the wholesale

business? Yes. Manufacturing Business? Commission Business. 7. What line of goods does your firm sell? Powder. 8. In what capacity do you represent your firm? Salesman. 9. State in detail duties required of you in your present occupation. Saleman. 10. If Salesman, Are You Selling to Manufacturers—Wholesale Trade? Yes. Retail Trade to be Sold Again? Yes.

I understand that if I shall hereafter change my business or vocation from that therein stated that I must notify the Secretary of the Association immediately of such change, as provided in Art. 9, Sec. 6, of Constitution.

11. Are you engaged in any other business? No. If so, state what business. ——. Give full duties required of you in said business? ——. Is your eyesight impaired? No. If so, to what extent? ——. 13. Is your hearing impaired? No. If so, to what extent? ——. 14. Have you suffered the loss of a limb? No. Hand? No. Foot. No. Eye? No. 15. Have you received any bodily injury, leaving you in a crippled condition? No. 16. Have you any physical deformity? No. 17. Have you ever received a rupture? No. If so, which side? ——. If so, do you wear a properly fitted truss? ——. 18. If engaged in the implement or machinery business, state if your duties require that you set up. ——; or if you are required to do expert work. ——. 19. What State Division do you wish to be placed in? Utah, Post A. 20. Have you ever been a member of this Association? Yes. What Division? Don't know. (In Pencil:) Utah Div. 21. Is your application pending in any other Association? No. If so, give name of Association. 22. Have you ever had, or are you now subject to fits, or any disorders of the brain, or any mental or physical infirmities? [fol. 28] No. 23. Have you, or have you ever had Syphillis, Lumbago, Cancer, Paralysis, Fainting Spells, Erysipelas, Rheumatism, Tuberculosis, Diabetes, Brights Disease or Heart Trouble. If so give particulars. No. 24. Do you drink wine, spirit-ous or malt liquors to excess? No. 25. Do you carry accident insurance in any other company or association? Yes. If so, give name of company or association, $5000.00.—26. Have you ever received any money from any accident company or association for injuries to yourself? No. If so, state the nature and date of your injury and the name of company or Association.

——. 27. Has any accident insurance company or association ever rejected your application or declined to reinstate you or cancelled your membership? No. 28. Do you understand and agree that in case of accidental injuries or death resulting from intoxication you or your beneficiary will receive no benefits from this Association? Yes. 29. Do you agree that if injured you will at once call a physician and notify the National Secretary within thirty days in accordance with the Constitution and By-Laws? Yes. 30. Do you understand and agree that this application is not binding and this *this* Association shall not be liable for any injury or death happening prior to the receipt and acceptance of this application by the National Board of Directors with membership fee and dues? Yes. Write Given Name of Beneficiary in Full. 31. To whom do you want death loss paid in case of death from accident? Mrs. James Prinsen. Certificates Cannot Be Made Payable to "Estate," or "Executor."

Each benefit certificate must be made payable to heirs blood relation, affianced wife, or persons dependent upon the member at whose instance issued, to whom he desires the benefit paid in event of his death. Relationship: Wife. (Street and Number 203 Mecklenburg Apa.) Residence: (Town) Salt Lake City, State Ut.

I promise that if admitted to membership in the Travelers Protective Association of America, I will do all in my power to advance the principles and interests of the Association.

I hereby expressly waive any and all provisions of law now existing, or that may hereafter exist, preventing any examining or attending physicians from disclosing any information acquired while acting in a professional capacity [fol. 29] or otherwise, or rendering him incompetent to testify as a witness in any way whatever.

I do also agree, if accepted as a member of the Travelers Protective Association, that the benefits shall be effective at twelve o'clock noon on the day on which this application is approved and accepted by the National Board of Directors and that the benefits to be paid shall be those only which may be provided for in the Constitution, By-Laws and Articles of the Association in force and effect at the time the accident occurs.

I agree to comply with all the requirements of the Constitution and by-laws of said Association as they now exist or may hereafter be amended.

Signature of applicant in own handwriting: (Signed) James Prinsen.

Dated at Salt Lake City, Ut., this 7th day of Oct., 1915.
Accepted 12 o'clock Noon October 13, 1915.

The letter attached to application and a part of plaintiff's Exhibit C, is as follows:

Western Powder Company, Jobbers of Hercules, Dupont and Giant Dynamite, Black Blasting and Sporting Powder, Fuse, Caps, Electric Exploders.

A. B. Gibson, Manager, P. O. Box 1404, 306 Dooly Block, Salt Lake City, Utah.

10/20/15.

Travelers Prot. Asso., St. Louis, Mo.

GENTLEMEN: Answering your favor of the 16th inst., Name of beneficiary is my wife. Christian or given name Uluetta Prisen.

Very truly yours; (Signed) James Prinsen.

(Rubber Stamp across face: (Unreadable) Oct. 23, 1915.
(In pencil across top:) 133,665.

STIPULATION AS TO CERTAIN FACTS

Whereupon it was stipulated between the attorneys for the plaintiff and the attorney for the defendant in open court as follows:

That the defendant is a corporation as alleged in plaintiff's complaint; that on October 7th, 1915, James Prinsen [fol. 30] made application for membership in defendant company, said applicaion being plaintiff's Exhibit C, and that a certificate of membership was executed and delivered by the defendant company to said James Prinsen on October 13th, 1915, said certificate being represented by plaintiff's Exhibit A; that on February 3rd, 1931, the said James

Prinsen at said time and ever since the 15th day of October having been the husband of Uluetta Prinsen, the beneficiary named in said insurance policy, was killed; that at the time of his death the said James Prinsen was a Class A member of the defendant company in good standing; that James Prinsen at the time he made application for membership in the defendant company made such application in Salt Lake City to poin the Utah Division of the defendant company and was initiated and became a member in Salt Lake City and paid his dues through Post A of the defendant company through Mr. West at the Newhouse Hotel in Salt Lake City, Utah.

The following proceedings and stipulations were had and entered into by the parties in open court by and through their respective counsel of record.

Mr. Gustin: You admit that Mr. Prinsen, the insured, came to his death on the 3rd day of February, 1931, through external, violent and accidental means, and then and there received bodily injuries which within six months—as a matter of fact, instantly——

Mr. Bagley: Instantly.

Mr. Gustin: —next following the date of said accident resulted in his death?

Mr. Bagley: I admit that, and admit more——

The Court: That does not get us very far. Better admit the facts.

The Bagley: As to how it occurred.

The Court: Because that can occur in a thousand ways.

Mr. Gustin: Do you stipulate on the 3rd day of February, 1931, at or near Cudahy Lane, Davis County, State of Utah, a railroad train then and there owned, operated and controlled by The Denver & Rio Grande Western Railway [fol. 31] Company, a corporation collided with the automobile in which the said James Prinsen was riding?

Mr. Bagley: Yes.

Mr. Gustin: Causing bodily injuries to the said James Prinsen which injuries resulted in his death on said day?

Mr. Bagley: I will admit that subject to your admitting the fact that the automobile truck in question, which was collided with by The Denver & Rio Grande train, was loaded with dynamite caps, and that the resulting collision

between the automobile truck and train caused the explosion of the dynamite in the truck and caused the death of Mr. Prinsen.

The Court: Hold on a minute; leave out your "caused"; you are connecting up—that is what happened?

Mr. Bagley: Yes.

The Court: And at that time Mr. Prinsen was killed?

Mr. Bagley: Yes, who was riding in the truck.

Mr. Gustin: We admit that, Mr. Bagley, as part of your case, as part of the defense in this case, upon the further understanding, however, that it is stipulated that Mr. Prinsen was on this truck as a mere invitee, or guest.

Mr. Bagley: I will admit these facts from which the legal inference may or may not be drawn; that the Titanic Powder & Supply Company had ordered some three hundred thousand dynamite caps from the Hercules Powder Company; that they said that Mr. Begaman would be in for those within the next day or so; that the Hercules Powder Company in this city telephoned that order to the Western Powder Company; that the order was received and written up by Mr. Prinsen; that thereafter, within a day or so, Mr. Begaman came in with his truck, automobile truck, and went to the magazine where this powder is kept, north of Salt Lake City, just over the line in Davis County; that Mr. Prinsen took the key to the powder magazine to effect the delivery of these dynamite caps; that after he effected the delivery of the caps he got upon the automobile of Mr. Begaman in which the dynamite caps had been loaded and rode from the magazine to the place of the collision with the Denver & Rio Grande train, which is at a point called the Cudahy crossing, just north of Salt Lake.

[fol. 32] It is further stipulated that Mr. Prinsen was at the time an officer of the Western Powder Company; that he took the key to this magazine and went over with Mr. Begaman on his truck and effected delivery of the powder and was returning on the truck when the accident happened.

Will you stipulate, Mr. Gustin, that while the powder in question belonged to the Hercules Powder Company, the Western Powder Company was the representative of the Hercules Powder Company, in this territory, and that for this trip to the magazine which Mr. Prinsen made, the

Hercules Powder Company paid the Western Powder Company one dollar?

Mr. Gustin: We would object to evidence of that nature on the ground that it is immaterial; but if we may have a ruling on that I will stipulate——

The Court: You admit it as a fact, but object to it on the ground stated. For the present the objection will be overruled.

Mr. Gustin: Exception.

Mr. Bagley: Will you stipulate that as the result of this accident Mrs. Prinsen mad- application to the Western Powder Company, or its insurance carrier, the State Insurance Fund, for compensation, on the ground that her husband was killed by an accident arising out of and in the course of his employment, and that she is now receiving compensation on that account?

Mr. Gustin: I will stipulate that Mrs. Prinsen made application under the industrial law of this state for compensation by reason of the death of her husband, and is now receiving compensation.

Mr. Bagley: Either from her employer or her employer's insurance carrier?

Mr. Gustin: Yes.

The Court: But you object to it as being immaterial?

Mr. Gustin: Yes, over our objection that it is immaterial.

The Court: The objection will be overruled at present. The legal effect of the stipulations will be determined after they are all in.

(Here follows side folios 35 and 36)

[fol. 33] Let me ask you if you are making the point—the distinction in this case that while he was riding on this truck which contained dynamite and it exploded, that his death resulted—possible or probably resulted from the collision in and of itself rather than from the result of the explosion?

Mr. Gustin: Yes, your Honor, we raise an issue on that question of causation.

Mr. Bagley: Then in the record will you admit that in the explosion the engineer of the Denver & Rio Grande engine was killed, Mr. Bagman, the other occupant of the truck, was killed; that when picked up Mr. Prinsen's body was very badly dismembered?

Mr. Gustin: With this reservation there, Mr. Bagley, we won't admit that the explosion caused the death of any of these people, but we will admit they were all killed in the wreck.

The Court: Can you get together upon what the situation was with respect to the destruction of the truck, the damage to the engine, and the persons who were killed or injured, and their bodily conditions? If you could cover that, if that distinction is to be relied upon, we would want the fact rather than somebody's conclusion.

Mr. Gustin: Do you intend to introduce evidence on the question of the speed of the train, matter of that kind?

Mr. Bagley: Yes. I also, unless it is admitted, intend to show that the automobile truck was just demolished, practically destroyed.

Mr. Gustin: We will admit that.

The Court: Haven't you the pictures of the scene, both of the truck and of the engine?

Mr. Bagley: Yes, I am going to put them in.

Thereupon defendant's exhibits numbered 4, 5 and 6 were offered and received in evidence without objection, the same being photographs of the truck upon which James Prinsen was riding, taken after the collision and explosion.

[fol. 34] DEFENDANT'S EXHIBIT 4



DEFENDANT'S EXHIBIT 5



[fol. 35] DEFENDANT'S EXHIBIT 6



Whereupon further stipulations were entered into between the parties as follows:

Mr. Gustin: Will you stipulate affirmatively, Mr. Bagley, that Mr. Prinsen was not employed or connected in any way with the Tintic Powder Company, the owner of the truck in question, and was not driving the truck?

Mr. Bagley: I will stipulate that Mr. Prinsen was not an officer or employee of the Tintic Powder Company, and that so far as I know was not driving the truck.

Mr. Gustin: That is one of the facts I spoke to you about the other day definitely.

Mr. Bagley: I think that is the fact. I would just naturally assume Baganan was the driver of the truck.

Mr. Gustin: And the truck was owned by the Tintic Powder Company?

Mr. Bagley: Yes.

[fol. 36] Mr. Gustin: You are going to submit evidence as to the speed of the train?

The Court: Can't you stipulate on that? What difference does it make whether it was going forty or thirty miles an hour? Certainly was a wreck there. What was the testimony in the other trial as to the speed?

Mr. Gustin: We have a report of the Interstate Commerce Commission that might—have you seen this?

Mr. Bagley: No.

The Court: What speed do they say?

Mr. Bagley: We have the testimony.

Mr. Gustin: At between twenty and thirty-five miles an hour.

The Court: That is my recollection; there were several witnesses that gave it differently.

Mr. Gustin: That after the impact the train went, according to the report—if Mr. Bagley will stipulate—

Mr. Bagley: Will you stipulate, Mr. Gustin, that the Cudahy Packing Plant is located to the north one hundred and fifty or two hundred feet of the crossing — question, and that as a result of the collision and explosion all the windows—substantially all the windows in that plant were blown out and that the glass and meat in the plant were damaged—that is, the meat in the plant was damaged by the broken glass?

Mr. Gustin: Over our objection, your Honor, as to its materiality.

The Court: The objection will be overruled, and all considered finally.

Mr. Gustin: Exception.

Mr. Bagley: Now, as to the speed of the train, I will either read a transcript of the fireman's testimony—unless we can agree to the material facts that he testified to.

The Court: There were several people who testified as to the speed of the train, as I recall it some of the plaintiff's witnesses in that case, also some of your witnesses. I

[fols. 37 & 38] may be mistaken. It is quite a while ago. A good deal of water has gone over the wheel since, and I have not thought of it, but it seems to me the testimony ranged from about twenty-five to thirty-five miles an hour.

Mr. Bagley: Yes, I think there is no doubt it was going that fast, or faster.

The Court: What is the finding of the Interstate Commerce Commission?

Mr. Gustin: The finding here is between thirty and thirty-five miles an hour before the brakes were applied, and then between twenty and twenty-five miles per hour at the time of the collision.

The Court: Of course that is based upon the composite testimony of the various witnesses, I assume; that is in accord with my recollection.

Mr. Gustin: Is that sufficient there, Mr. Bagley, for your purpose?

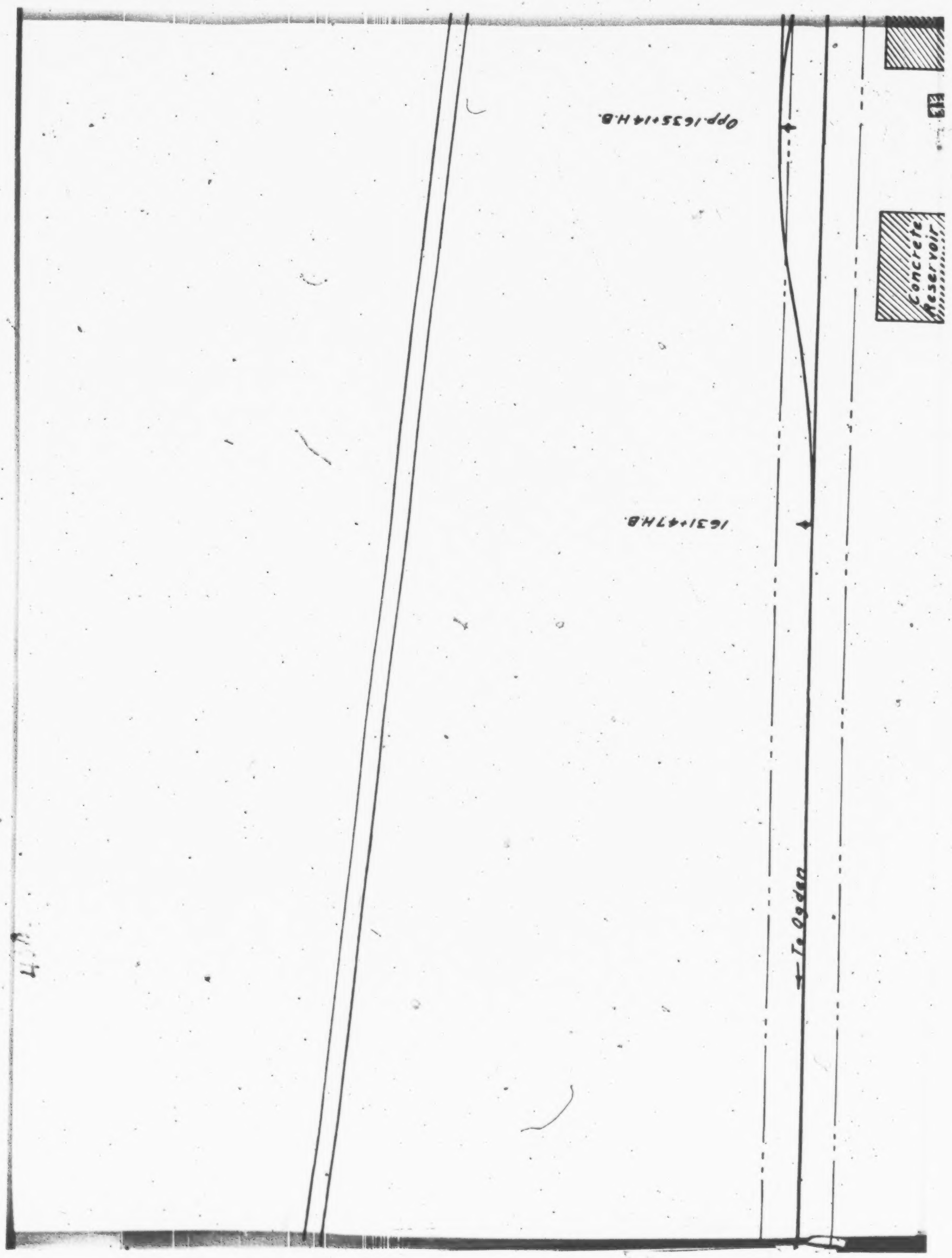
Mr. Bagley: What is that?

Mr. Gustin: That at the time of the collision the train was going between twenty and twenty-five miles an hour.

Mr. Bagley: Yes, I will admit it was going at least that fast.

Whereupon plaintiff's Exhibit D, the same being a map and sketch illustrating the physical conditions at or near the point of the accident and at the time thereof and drawn to scale, was introduced and received in evidence. The said map or sketch being as follows, to-wit:

(Here follows map, side folio 39.)


Opp. 1635+14 H.B.
1631+47 H.B.
Concrete Reservoir
To Ogden

Opp. 1635+14 H.B.

Sheep Building

1639+63

751

Point Where Engine Stopped
1614 Ft. from Point of Accident

Opp. 1641+54 H.B.

Office

1643+94 H.B.
1643+98 N. End Freight Shed

Barn

B.E.R.R.Co.

O.S.L.R.R.Co.

D.&R.G.W.R.R.Co. Main Track

W. U. Telegraph Line

Postal Line

Stock Yards

Sheep Pens

Stock Offices

Cudahy Packing Plant

To Salt Lake City →

Broken 85° East Rail

Location of Track Geometry Inter Section

1636+77 Sta. Bd
1636+82 P.C.

1636+94 Xing Sign

1637+12 24' Xing

1637+28 Stop Sign
1637+37 P.C.

ALL VEHICLES MUST COME TO FULL STOP BEFORE CROSSING TRACKS

W. U. Telegraph Line

Sign Reading

DIRECTION OF TRAIN

68'

Postal Telegraph Line

Pole

Clearance Sign

Visibility 13600' at point

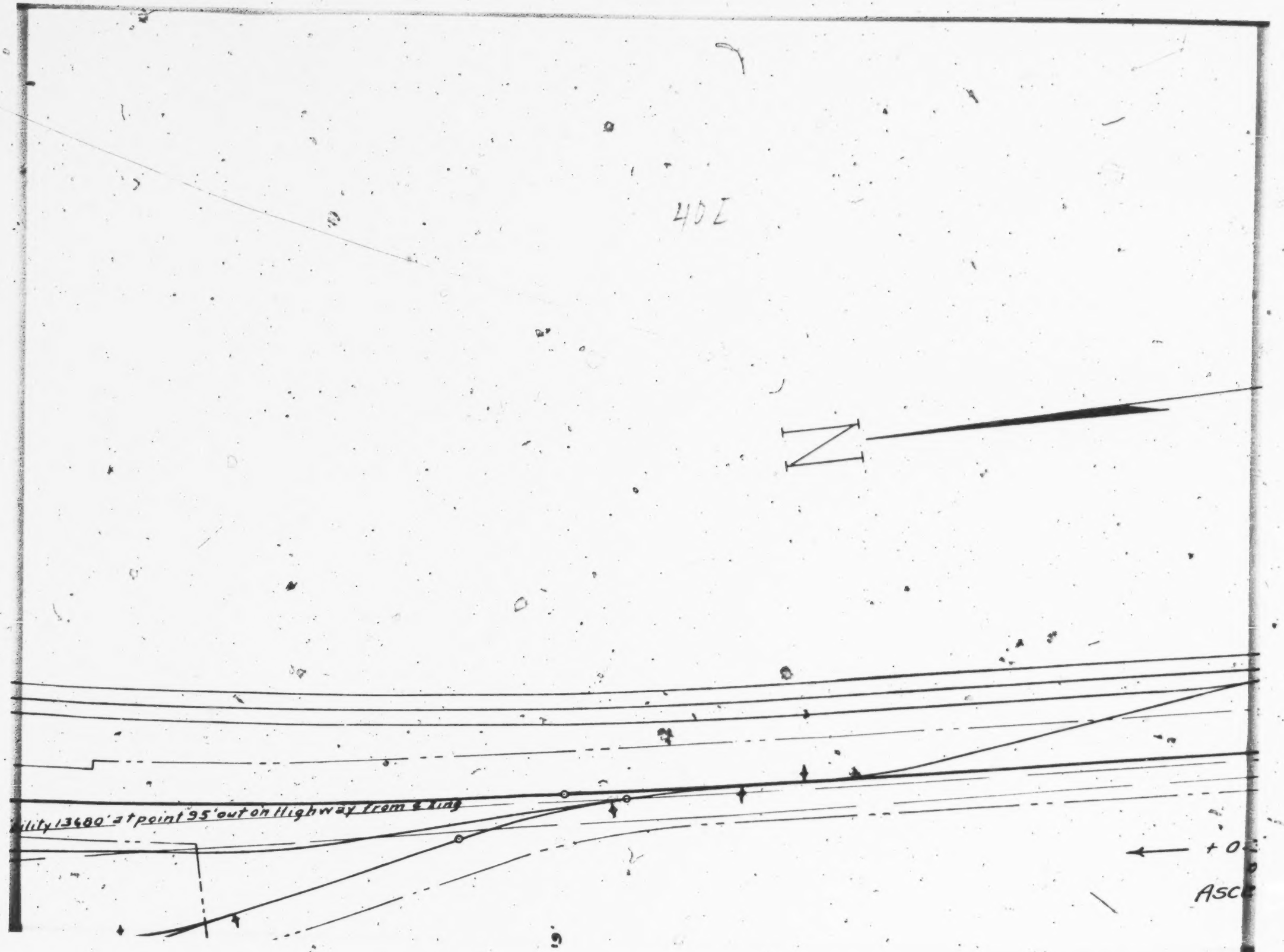
Cudahy Packing Plant

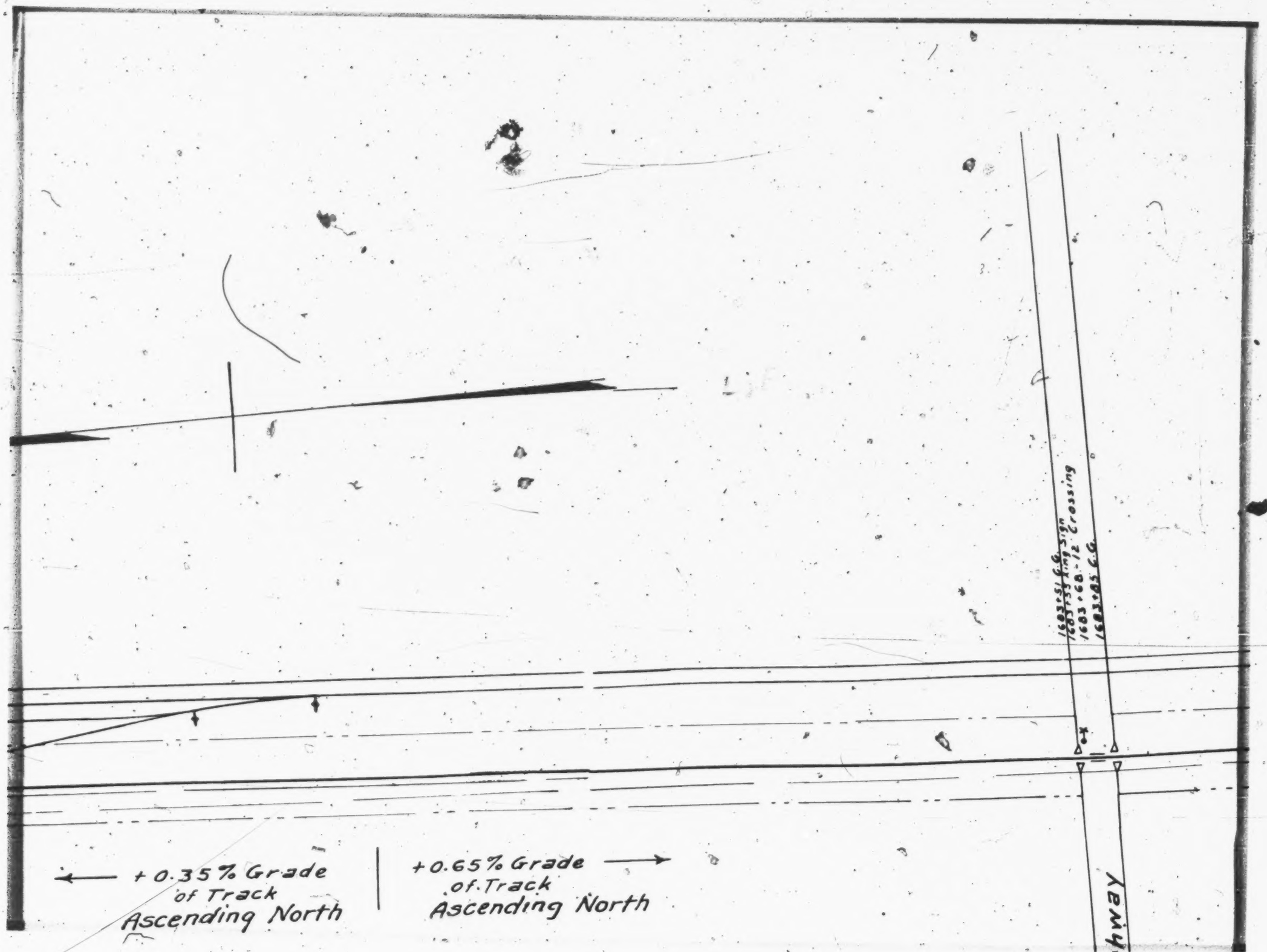
Garage

Visibility 3700' at point 133' out on highway from

1663+36 P.C.

Auto


401
N
ility 13480' at point 95' out on Highway from ℄ King
ASC


+0.35% Grade of Track Ascending North
+0.65% Grade of Track Ascending North
Highway

Highway

1683+51 C.G.
1683+55 Xing Sign
1683+68 - 12 Crossing
1683+85 C.G.

Tolleson

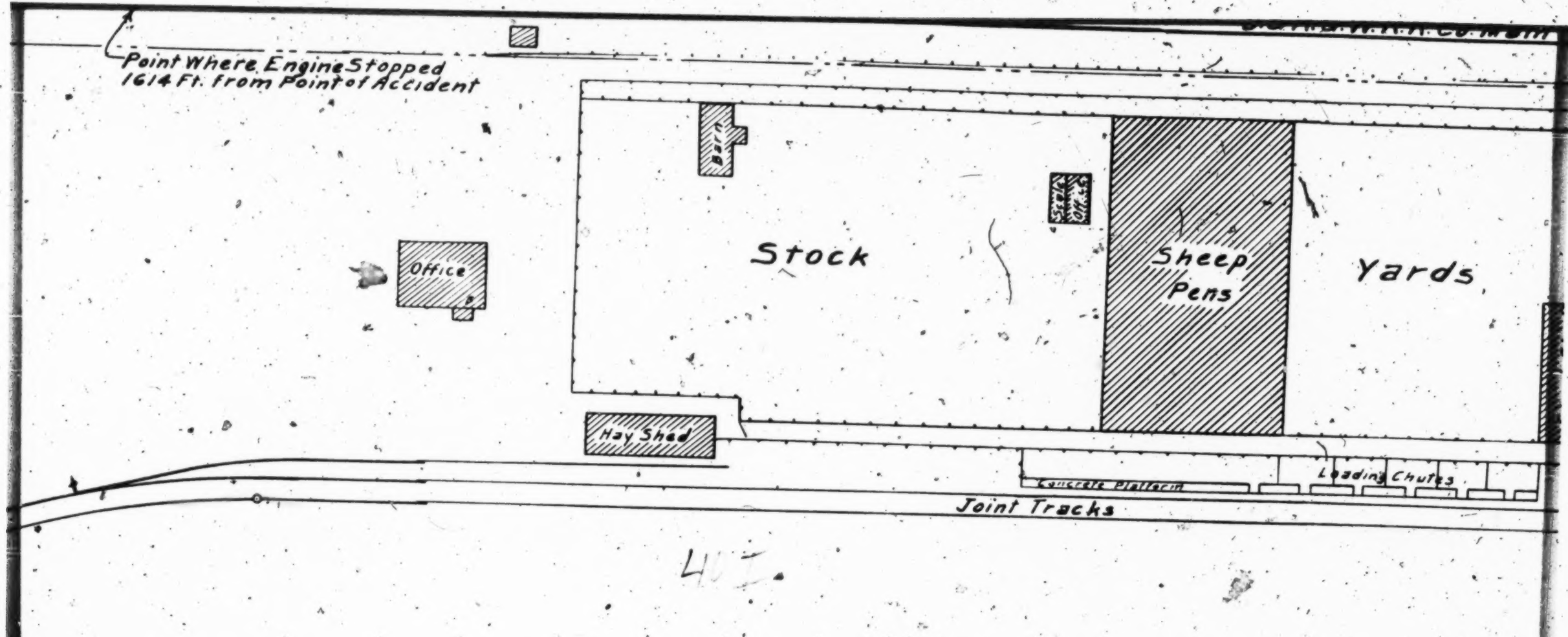
1692+91

750

Concrete Reservoir

Sheep Building

Point Where En
1614 Ft. from P


Point Where Engine Stopped
1614 Ft. from Point of Accident
Barn
Scales
Office
Stock
Sheep
Pens
Yards
Hay Shed
Concrete Platform
Loading Chutes
Joint Tracks

407

D.&R.G.W.R.R.Co. Main Track

W.U. Telegraph Line

Postal Telegraph Line

68

Sign Boards

Pole

Clearance Sign

DIRECTI

Yards

Cudahy Packing Plant

Stock Shed

Stock Shed

Loading Chutes

Garage

Visibility 3700' at point 133

Auto Park

Approximate

Ow.

Ow.

Visibility from this point we
unobscured for distance of
2.6 miles along track

DIRECTION OF TRUCK

Highway

3300 Feet From Turn in Highway to Point of Accident

DIRECTION OF TRAIN

Visibility 13680' at point 95' out on highway from ℄ Xing

Visibility 3700' at point 133' out on highway from ℄ Xing

1663+15.6
P.C. 1°.7'

Approximate Location of Cars Feb. 3-1931

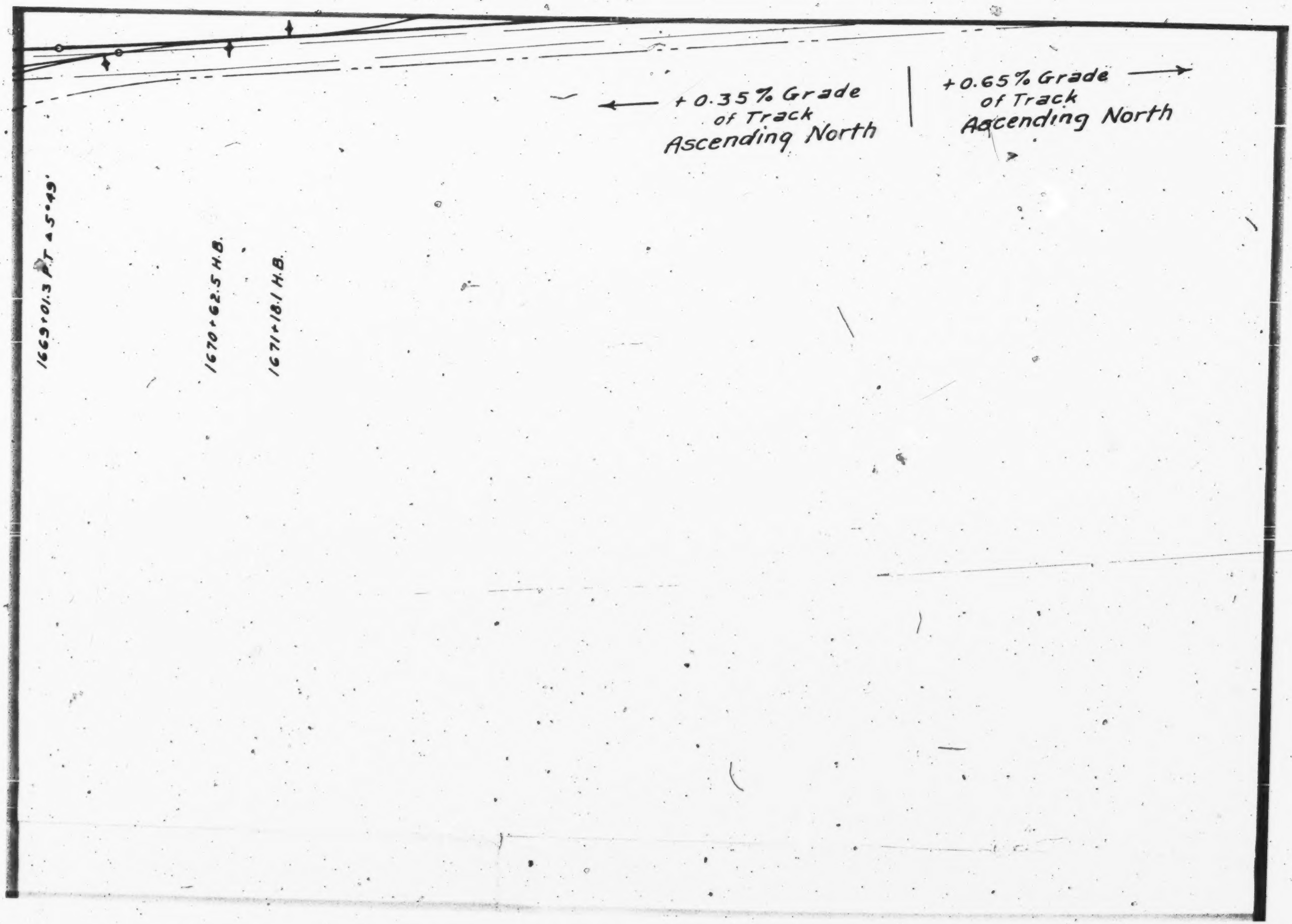
DW

1669+01.3 P.T. 4°49'

1670+62.5 H.B.

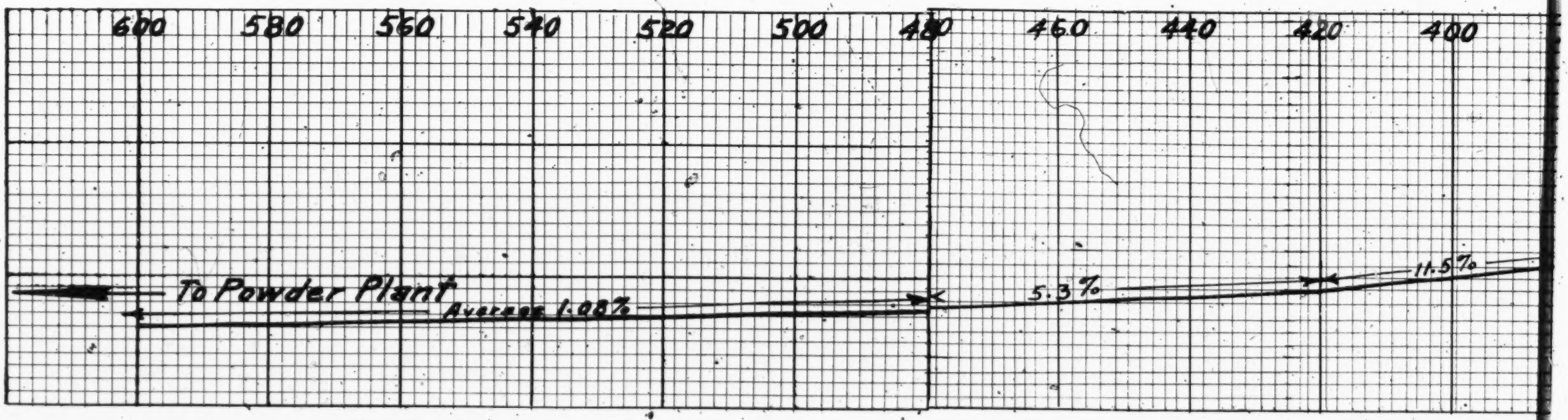
1671+18.1 H.B.

y from this point west
ured for distance of
s along track →


+0.35% Grade of Track Ascending North
+0.65% Grade of Track Ascending North
1669+01.3 P.T. 4.5°49'
1670+62.5 H.B.
1671+18.1 H.B.

Grade
ack
ding North

Highway


600
580
560
540
520
500
480
460
440
420
400
To Powder Plant
Average 1.08%
5.3%
11.5%

420 400 380 360 340 320 300 280 260 240 220 200

DIRECTION OF TRUCK IN

Average 6.6% Grade

11.5%

3.76% Track

2.32.5% Track

2.25% Track

DIF
+ 3300 Fee
in Highw
of Accid

240 220 200 180 160 140 120 100 80 60 40 20

ON OF TRUCK INVOLVED IN ACCIDENT

Average 0.04% — Av. 4.6% — Av. 2.5% — Av. 3.3% Grad

PROFILE OF ROAD

Facing toward Packing Plant

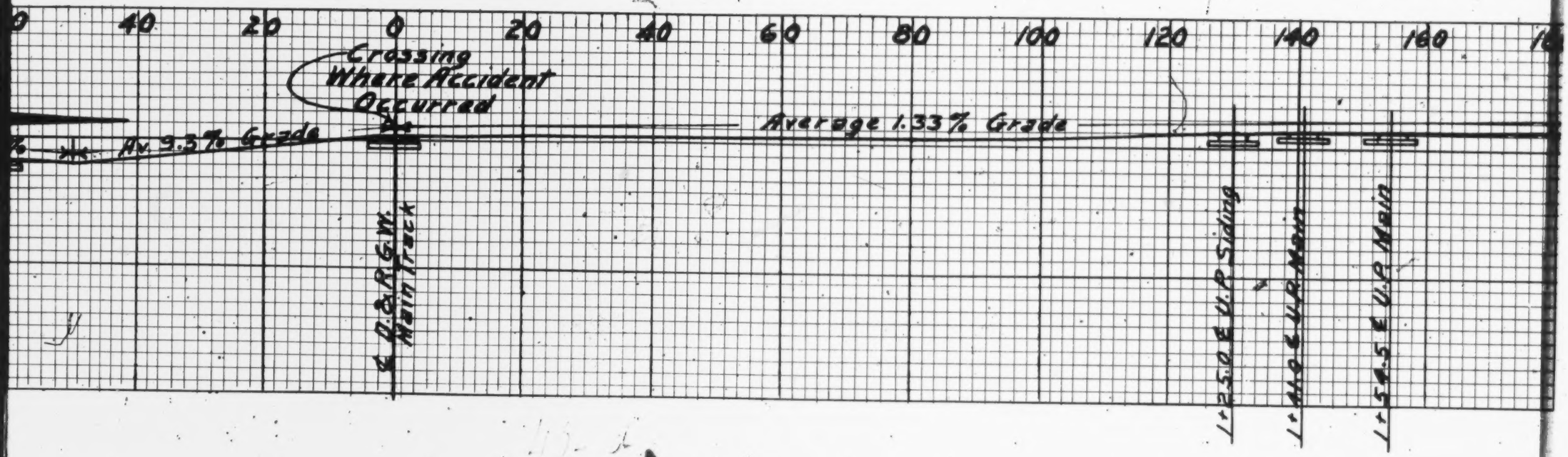
Scale 1" = 20'

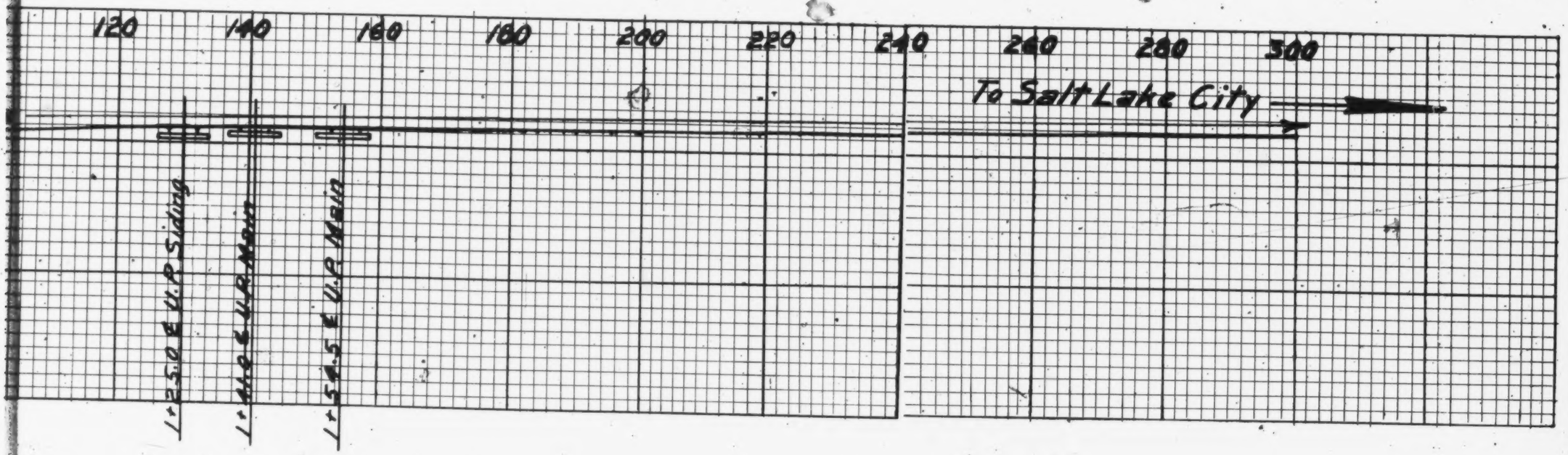
2+32.5 ℄ Track

2+25 ℄ Track

+73.0 ℄ Track

+62.5 ℄ Track


40
20
0
20
40
60
80
100
120
140
160
Crossing
Where Accident
Occurred
Av. 3.3% Grade
Average 1.33% Grade
C.B.&Q.R.R.
Main Track
1°25.0 E U.P. Siding
1°11.0 E U.P. Main
1°54.5 E U.P. Main


120
140
160
180
200
220
240
260
280
300
To Salt Lake City
1+23.0 ℄ U.P. Siding
1+44.6 ℄ U.P. Main
1+54.5 ℄ U.P. Main

SKETCH
Showing
LOCATION OF ACCIDENT
To
D.&R.G.W. TRAIN NO. 3
At
NORTH SALT LAKE, UTAH
FEB. 3 - 1931
Scale: 1" = 100'

[fol. 40] STIPULATION AS TO CERTAIN EVIDENCE, ETC.

Whereupon, it was further stipulated, in open court, between the attorneys for the respective parties, that part of the testimony of the fireman of the Denver and Rio Grande Train involved in the accident, taken in another suit, might be read into the record by the defendant, and thereupon the testimony of the fireman to the following effect was read into the record by the defendant's attorney, Mr. Bagley, to-wit: The railroad track was straight in both directions on either side of the crossing and the train was about two hundred and fifty feet from the crossing when the fireman saw the truck at which time the truck was eighty-five feet west of the crossing; that the train was running about forty miles an hour and the fireman estimated the speed of the truck at fifteen or sixteen miles an hour. He saw two men in the truck sitting in the covered cab side by side, and he further saw that the truck was loaded with boxes.

It was stipulated that Dr. John J. Galligan, who signed the attending physician's statement, Exhibit 1, if called would testify that Mr. Prinsen's body was exceedingly mutilated, the head and arms and the body—that no autopsy or post-mortem examination was made because the body was mutilated beyond examination.

Whereupon C. R. FITZGERALD was called as a witness on behalf of the defendant and having been first duly sworn testified as follows: That he resided in Salt Lake City, Utah; that he was a Claim Adjuster of the Denver and Rio Grande Railroad Company and as such Claim Adjuster went upon the scene of the accident in question about forty minutes after its occurrence; that the accident occurred about 2:40 P. M. on the 3rd day of February, 1931, whereupon defendant's exhibits 7 to 14 inclusive, were thereupon marked by the reporter and identified by the witness as being photographs of the crossing at which the accident occurred, taken from various angles, and were offered by the defendant and admitted in evidence without objection.

Whereupon the witness further testified that approaching the crossing from the west, the first large obstruction was the Cudahy garage, approximately ninety feet west of the crossing a person could see a train approaching from the south some three-quarters of a mile and have a clear un-

(Here follows side folios 41 to 52)

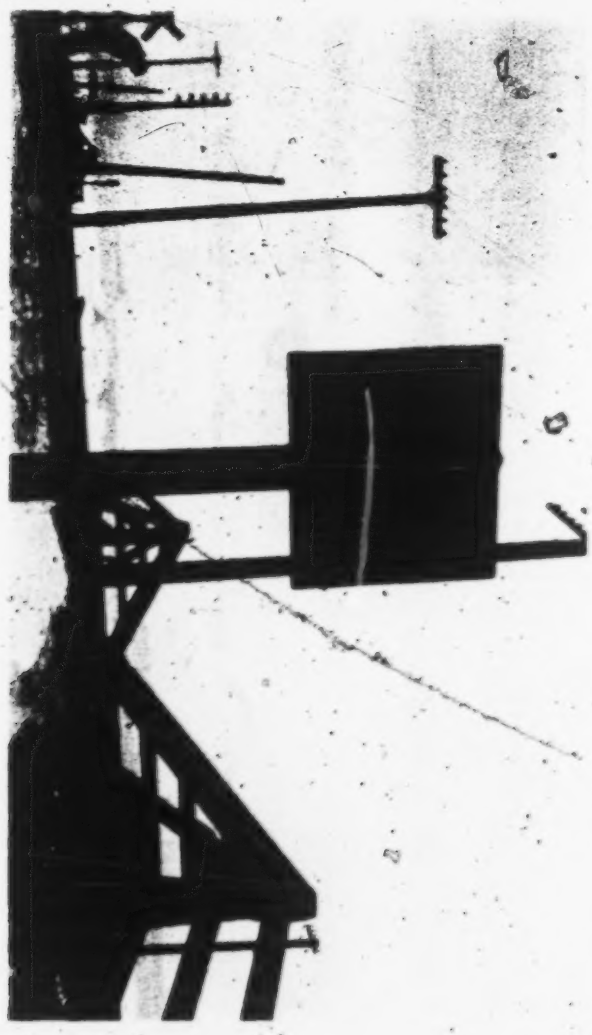
of the track; that from a point ninety feet west of the crossing a person could see a train approaching from the south some three-quarters of a mile and have a clear un-
[fol. 41] obstructed view of the approaching train with the exception of a few telephone poles.

Whereupon defendant's exhibits 15, 16 and 17 were marked by the reporter and identified by the witness as fairly representing the condition of the automobile cab and engine after the explosion, were offered by the defendant and received in evidence without any objection.

Whereupon the witness further testified that the train moved on about a quarter of a mile after the collision; that it was a regular passenger train carrying three coaches, an engine and tender; that the remains of the truck after the collision were north and east of the crossing down below the rails in a depression approximately forty or fifty feet from the crossing; that at the Bamberger Shops, approximately a quarter of a mile from the collision, one hundred and forty-seven panes of glass were blown out; that near the crossing there was a station of the Oregon Short Line Company, the doors of which were blown out, records scattered and the stove knocked over; that in the post office building adjoining the Oregon Short Line Station all of the windows were broken out and records were strewn around; that the train which collided with the truck was two minutes late in leaving Salt Lake City; that the engine struck the rear end of the truck and that the dynamite caps were on the rear end.

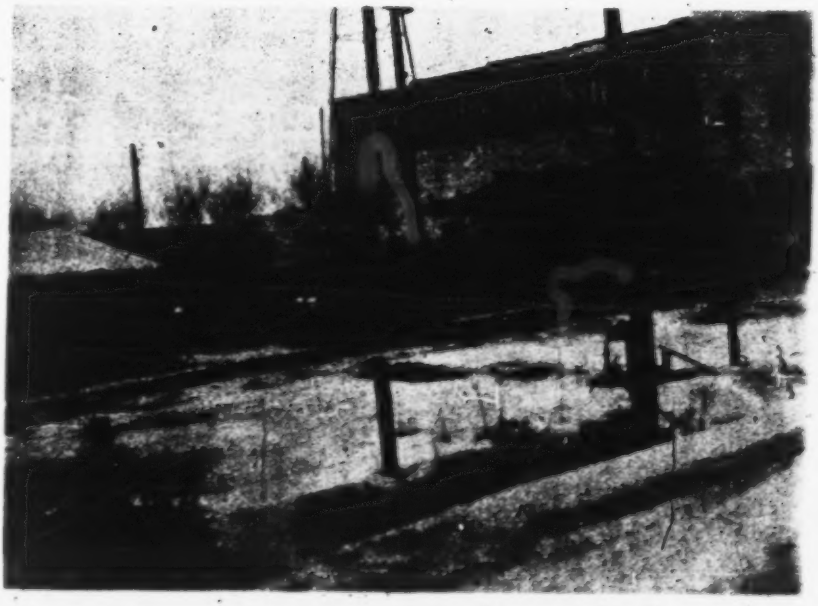
[fol. 42] DEFENDANT'S EXHIBIT 7,

introduced in evidence as aforesaid, is a photograph showing the sign just west of the main line of the Denver and Rio Grande Western Railroad track and south of the travel part of the highway and with reference to the crossing at the point of the accident, was taken at a point south of the travel part of the highway and looking eastward. The exhibit is as follows:



[fol. 43] DEFENDANT'S EXHIBIT 8,

introduced in evidence as aforesaid, is a photograph taken from a point one hundred and fifty feet south of the center of the crossing involved, the photographer standing in the center of the main line track. The view is looking northwest from the center of the main line. The tracks shown in the photograph are spur tracks leading to the loading dock at the east side of the Cudahy Plant. The exhibit is as follows:



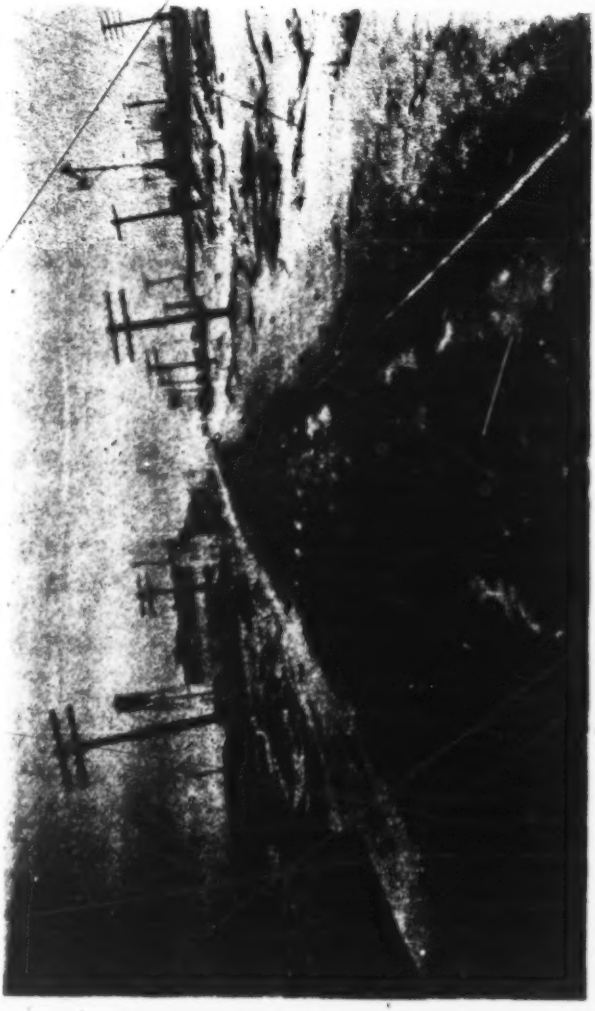
[fol. 44] DEFENDANT'S EXHIBIT 9,

introduced in evidence as aforesaid, is a photograph taken from a point approximately seven hundred feet south of the crossing involved, looking northward. The photograph was taken at the north end of the curve in the Denver and Rio Grande Western main line track, which curve is the first one south of the crossing. Exhibit number 9 is as follows:



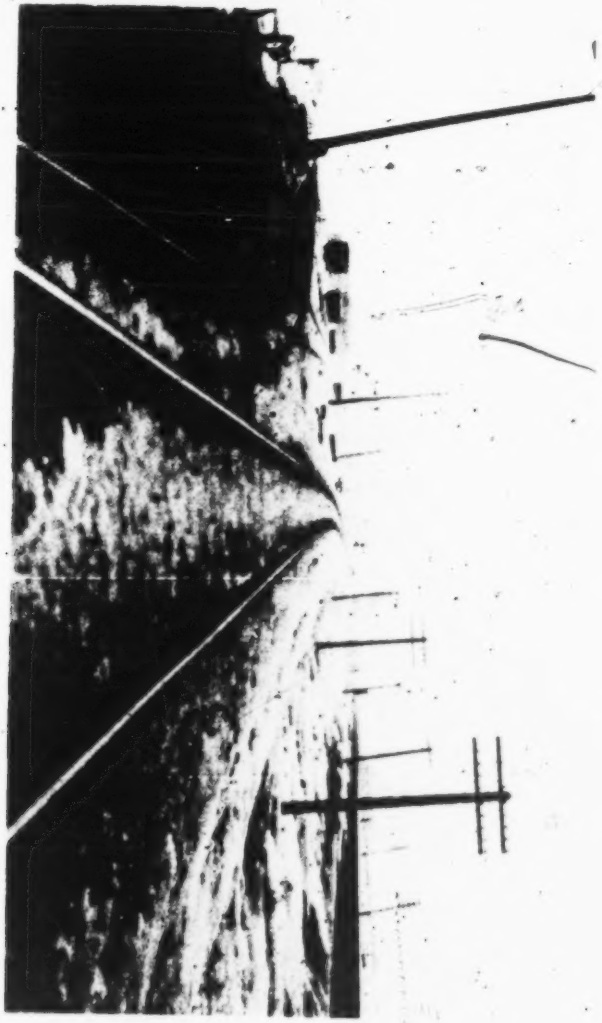
[fol. 45] DEFENDANT'S EXHIBIT 10,

introduced in evidence as aforesaid, is the same view as Exhibit 9, except that the photographer was standing at a greater distance from the crossing and at a point approximately two hundred and fifty feet nearer to the crossing than the view shown by Exhibit 11. Exhibit 10 is as follows:



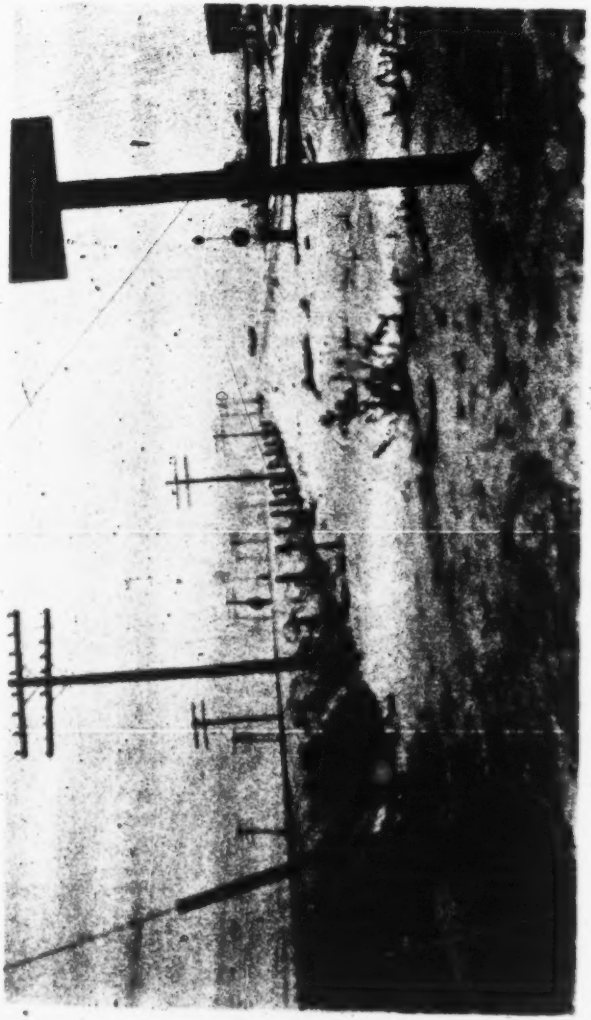
[fol. 46]. DEFENDANT'S EXHIBIT 11,

introduced in evidence as aforesaid, is the same view as defendant's exhibits 9 and 10, the photographer standing approximately twelve hundred feet south of the crossing and in the center of the main line track, the picture looking north toward the crossing. The track in the foreground and in the center of the picture is the track upon which the train was running at the time of the accident. Exhibit 11 is as follows:



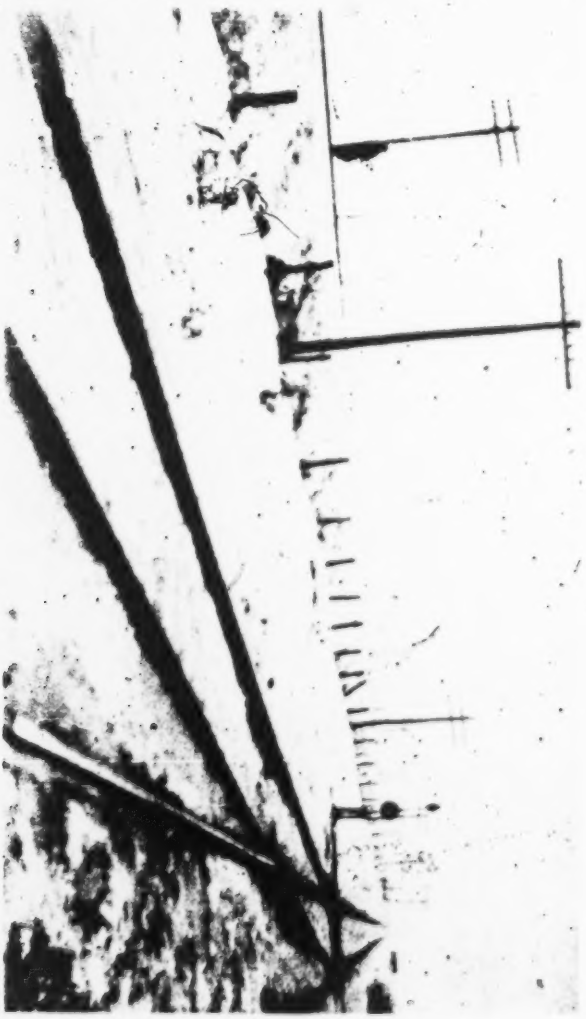
[fol. 47] DEFENDANT'S EXHIBIT 12,

introduced in evidence as aforesaid, is a photograph looking south from the center of the highway at a distance of approximately fifty feet west of the west rail of the Denver and Rio Grande main line track, which can be seen beyond the switch which leads to the stock corrals. The crossing at the point of the accident is toward the east and is not shown in the exhibit. Defendant's Exhibit 12 is as follows:



[fol. 48] DEFENDANT'S EXHIBIT 13,

introduced in evidence as aforesaid, is a photograph taken from a point seventy feet west of the main line track from the center of the west spur track leading to the loading dock of the Cudahy Plant, the camera being held at the center of the highway. The photograph is looking south and the crossing at the point of the accident is to the east and not shown in the exhibit. Defendant's Exhibit 13 is as follows:



[fol. 49] DEFENDANT'S EXHIBIT 14,

introduced in evidence as aforesaid, is a photograph taken at a point in the center of the road and eighty feet west of the track upon which the train was running at the time of the accident, the camera pointing south and east. The photograph does not look toward the crossing at the point of the accident. Defendant's Exhibit 14 is as follows:

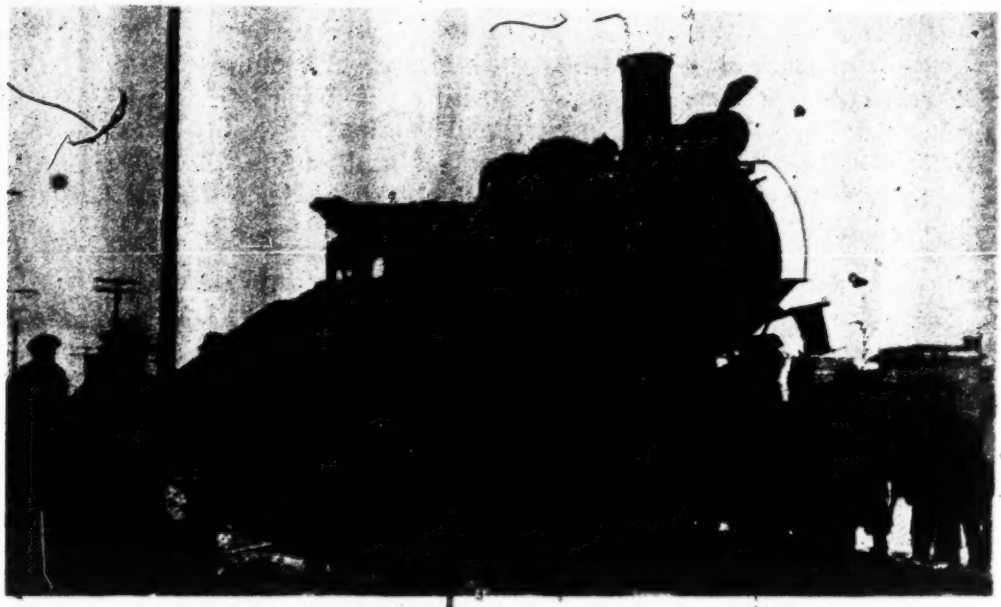


Defendant's Exhibit 15

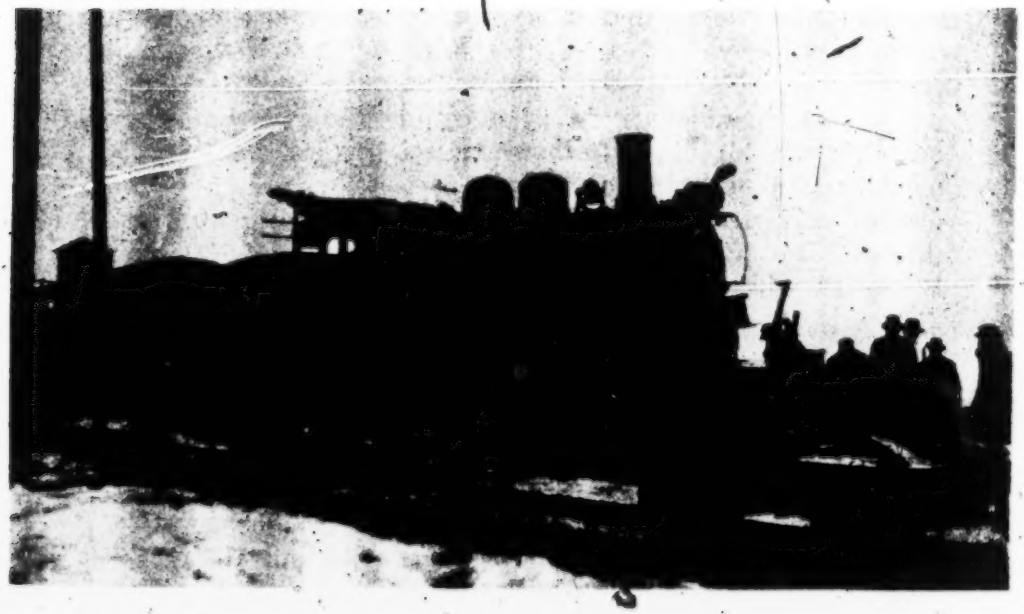
[fol. 50] Defendant's Exhibits 15, 16 and 17, introduced in evidence as aforesaid, are photographs representing the conditions of the engine cab and engine after the accident and explosion. Defendant's Exhibit 15 is as follows:



[fol. 51] DEFENDANT'S EXHIBIT 16 is as follows:



DEFENDANT'S EXHIBIT 17 is as follows:



[fol. 52] Whereupon both sides announced to the court that they rested and thereupon the defendant moved the court for a directed verdict and the following proceedings were had:

DEFENDANT'S MOTION FOR DIRECTED VERDICT

Mr. Bagley: Comes now the defendant, the Travelers' Protective Association of America, and moves the court to direct a verdict in its favor on the grounds and for the reasons:

First: That it affirmatively appears that this defendant is a fraternal benefit association, not an insurance company in the commonly accepted sense,—

The Court: Not an old line company.

Mr. Bagley: Not an old line company.

That is is governed not by what we commonly call a policy of insurance, but by a constitution and by-laws; that it gives benefits of certain kinds and in certain amounts both for injuries and for death when the accident occurs in a certain way, and that it exempts certain risks, and that it affirmatively appears in this case that the association shall not be liable to a member for any death benefits when he is killed while participating in the moving or transportation of gunpowder, dynamite or other explosive or explosives.

And that it affirmatively appears in this case that when Mr. Prinsen met his death he was participating in the movement and transportation of some three hundred thousand dynamite caps loaded on the truck, which exploded when the collision occurred between that truck and the Denver & Rio Grande train.

Second: That the constitution of the association further provides that the association shall not be liable to the member or his beneficiary in case of death when the death is the result of a voluntary or unnecessary exposure to danger or to obvious risk of injury;

And that it affirmatively appears in this case that the deceased, Mr. Prinsen, on the occasion in question, was voluntarily riding upon a truck loaded with dynamite or its equivalent, and that he heedlessly, recklessly, if you please,

in broad daylight, drove that truck loaded in that way on which he was seated on to a railroad crossing in front of an approaching train which he could have both seen and heard in time to have avoided the accident, which it was his duty to do.

[fol. 53] The Court: You say he drove; isn't any evidence he drove.

Mr. Bagley: I mean he permitted it to be driven.

The Court: He rode in the car that was driven.

Mr. Bagley: That's it.

DECISION

Thereupon the court took the matter under advisement and after argument of counsel announced its decision as follows:

The Court: This policy sued upon was issued subject to the provision, found in the constitution referred to by counsel, Article XII, Section 1:

"This Association shall not be liable to a member or his beneficiary for any disability benefits, special loss benefits or death benefits, when the disability, special loss, or death of a member occurs under any of the following conditions or circumstances; when inflicted by a member on himself, while sane or insane; when there are no visible marks of injury upon the body (the body itself not being deemed such a mark in case of death); when or while a member is in any degree under the influence of intoxicating liquor or liquors or of any narcotic or narcotics; when caused wholly or in part by reason of or in consequence of the use of intoxicating liquor or liquors or the use of any narcotic or narcotics; when caused wholly or in part by any bodily or mental infirmity or disease, dueling, fighting, or wrestling; when or while a member is acting as a sailor or soldier or is participating in war or riot; when or while a member is acting as an aviator or balloonist or is participating in aerial navigation or aeronautics of any kind either as a passenger, operator or assistant; when a member is participating in public or agreed automobile racing; or in wrecking, mining, blasting, or in the moving or transporta-

tion of gunpowder, dynamite, or other explosive substance or substances; when a member is murdered; when resulting from hazardous adventure or an altercation or quarrel; when there is a disappearance of a member; when the result of voluntary over-exertion (unless in a humane effort to save a human life); when the result of voluntary or unnecessary exposure to danger or to obvious risk of injury."

And then proceeds with a list of others, which I will not read; quite a number of exceptions in this policy from liability.

[fol. 54] It will be noticed, I think, that a few of the clauses read used the words, "when caused by," or words of similar meaning, while others simply relate to time or condition, being "when" or "while."

The two clauses under discussion today belong to the "when" division. "When a member is participating in * * * the moving or transporting of gunpowder, dynamite, or other explosive substance or substances; * * * when the result of voluntary or unnecessary exposure to danger or to obvious risk of injury."

The insured was killed in a collision between an automobile in which he was riding and a Rio Grande train, at the crossing near the Cudahy Packing Company's plant, just outside of Salt Lake City.

The automobile or truck was loaded with dynamite caps, being an explosive substance or substances within the meaning of the clause in the constitution. The rear end of the car was struck by the engine. Under the stipulation it would appear that the front of the truck had gotten over the track, but not sufficiently to clear it; just how much of the rear end was still on the track and hit by the engine, I believe is not mentioned or contained in the stipulation.

The insured was riding in the cab, by the side of the truck driver. They were coming east; the railroad train was moving north, with the result that the insured was sitting on the side next to the approaching train. The train was in plain view of the driver of the truck, and of the deceased, from a point about eighty feet from the crossing.

The train was moving, according to the testimony of the fireman, when he first observed the truck, about forty miles an hour. I believe he estimated the truck was moving about

fifteen or sixteen miles an hour. The fireman observed the truck from the time he saw it, if not constantly, nearly so, from the time he first saw it until about the time the collision occurred. He saw the two men in the car—in the cab of the truck. He is the only witness, and I believe the only testimony in the record with respect to the two men in the car is that contained in his testimoy.

I believe it is not covered by your stipulation, what these [fol. 55] men who were driving the automobile did or attempted to do, except he testified he observed them in the car.

They were not there by chance, it appears. By prearrangement between the parties referred to in the stipulation the insured, who was employed by a powder company, went out to the powder magazine beyond the railroad track and westerly from the Cudahy Packing Plant for the purpose of getting these dynamite caps in a truck. He had the key to the magazine.

I don't know whether it is definitely stipulated in the record or not, but it is quite apparent they went out together in the truck.

Now, I am not particularly familiar with dynamite caps, so as to know what sort of bulk three hundred thousand dynamite caps would make. Presumably they were in boxes of some sort, and probably in a number of boxes. The court will take notice, however, that that number of caps would create an explosion of tremendous power if exploded at once, simultaneously.

Now, he went out there for the purpose of making delivery to the truck driver for the purchaser of the dynamite caps, as I understand the record. What happened at the magazine we don't know. We do know that they went for the purpose of loading these caps into the truck and hauling them away. Whether he assisted in loading, of course, is unknown. And as nothing occurred in that part of the business, it is not of great importance.

Having loaded the truck, the driver and the insured got into it and were returning, I presume over the same route that they had used in going to the magazine.

The language of the Constitution is that the policy does not apply and no liability is created when a member is participating in the moving or transportation of explosive substances. Was he participating in the moving or transpor-

tation of these dynamite caps while riding back from the magazine where they had been loaded on to the truck, is the question.

He was not driving the truck. But the exception is not based upon participating in the moving or transportation [fol. 56] of a truck. It is participation in the moving or transportation of dynamite.

I think the word "participating" is used in a practical sense, and should be so construed in this case.

If, when they arrived at the magazine and he picked up boxes and carried them from the magazine and put them in the truck, was he participating? If he sat in the truck and received them from the other man and placed them in position on the truck, was he participating in the moving or in the transportation of this dynamite?

He might have stood in the magazine, at the door, and handed them out to the other man; the other man may have loaded them into the car. He may have stood by, and let the other man do it all.

But from the time they began to move the dynamite out of the magazine and into the car there was a moving, and in a limited sense a transportation of dynamite caps.

If this language in the constitution is to be construed in a very narrow sense, then it would be limited to any act on his part with respect to the moving or transportation of the dynamite caps. But if it is to be construed in the sense that it means having entered upon this business of delivering to the purchaser of the caps bargained for, the order filled, and he went out with the driver of the truck to make delivery, then he became a participant from the time the operation of it began; and it seems to me that having gotten out there in that way, the natural thing for him to do would be probably to return in the same way. And riding in the same automobile with the driver, with that sort of load, he assumed some sort of responsibility with respect to the situation as it might arise.

It seems to me that the natural thing for a man to do that goes out to load dynamite, or a quantity of dynamite caps like this, gets in an automobile or truck with the driver to return, at least to his office, would feel that he owed some sort of responsibility to see that those caps were being transported safely. Dangerous merchandise, if we may so call it, as very well proven in the result of this drive.

Now, I assume when they approached that railroad track [fol. 57] that both of them saw it, because we must conclusively presume that people see what is right before them.

Now, it is to be presumed that he saw that approaching train; he was sitting on the side next to it; it was in plain view; or should we indulge the presumption that he was blind, and did not see it?

If this jury should go out and find—and I submitted it to them—did that man see that train approaching, or didn't he, under the evidence in this case, they were to find he did not see it, upon what sort of presumption would that finding be based?

So that in the decision of this case I presume conclusively that he saw this approaching train, and that the driver did, too.

With what result? If they saw the train, or if the driver saw it—he had the management of the car—he must have concluded that he could make the crossing.

We can not imagine that those two men drove that eighty feet and were so blind or so thoughtless or had their minds so concentrated upon something else that though plainly within view they never saw the train.

So I conclude that the only reasonable presumption here is that the approaching train was seen, and the driver, at least, concluded he could make the crossing ahead of it, and he got more than half across, but he didn't quite get over.

Now I will take up the other ground for a directed verdict relied upon by counsel.

"When the result of voluntary or unnecessary exposure to danger or to obvious risk of injury."

Now, if the deceased saw that train and his automobile was being driven by his companion at his side fifteen or sixteen miles an hour, and the train was approaching, coming twice that fast or more, perhaps, and he was some seventy or eighty feet away when it was observed, which would place the train probably some two hundred feet up the track from the crossing, during that short interval of time while they were constantly approaching a common point and apparently inevitably getting there about the same time, or get by by the bare skin of his teeth, what should he have done? The danger was certainly obvious. [fol. 58] And if he kept his seat in the car it was certainly

voluntary, assuming that he saw the train approaching and stayed in the car, the chance that he took surely would be voluntary, because it would be conscious, and I am inclined to think that is the correct construction to give to that section of the constitution.

It is not mere passive negligence, that is the result of careless oversight or want of care in taking notice. I am inclined to think the plaintiff's construction of the interpretation of that section is the correct one. A thing to be voluntary implies a will, and to exercise a will implied knowledge, and choice.

I think the conclusion is imperative that these men saw this train and thought they could get over the track before it reached the crossing. I don't know what happened. Maybe the train was moving faster than they thought. Maybe the road was such that they were not making the speed for that distance that they concluded or thought they could make. But in any event, the car was driven apparently with the intention of getting over the track before the train reached it.

Now, was that an unnecessary hazard or risk?

"When the result of voluntary or unnecessary exposure to danger or to obvious risk of injury."

It seems to me it was both voluntary and unnecessary. He was not driving the car, but a man could afford to take the chance of jumping out of the side of the automobile traveling fifteen or sixteen miles an hour with much less chance of serious injury than he could take the chance of beating a railroad train to the crossing in that same automobile, particularly when it had all that dynamite in it.

Strictly speaking, I do not think that the doctrine of negligence, or the term, rather, negligence, is an exact word to be used in connection with this section of the constitution. It has more of the element of the assumption of risk. A man who consciously knows his surroundings takes the chances. Of course, the term "assumption of risk" is not a term that is applied to negligence except as it arises between employer and employee. Its use has that limitation, but by analogy the liability to the member ceases when the death is the result of voluntary or unnecessary exposure to obvious risk of injury. If a man takes a chance [fol. 59] and is injured or killed, he forfeits his right to recover under the policy, or loses it.

Under the State of facts in this case, gentlemen, none of them being in dispute, I am unable to see what there is to submit to the jury with my interpretation of the meaning of the language of the policy or the constitution which is a part of the certificate.

It seems to me at the time of this unfortunate accident he was both participating in moving and transporting these dynamite caps, and that under the circumstances of the case he voluntarily and unnecessarily exposed himself to a very obvious risk of injury.

With that view of the case it becomes the duty of the court to grant the motion and direct a verdict for the defendant, and you may have your exception.

Mr. Gustin: The record may show our exception.

Thereafter by order of the court timely made the plaintiff's time within which to serve and lodge with the Clerk of this court her Bill of Exceptions was enlarged and kept alive to and including the 10th day of July, A. D. 1932.

And now, in furtherance of justice and that right may be done, the plaintiff, Uluetta Prinsen, tenders and presents the foregoing as her Bill of Exceptions in this case and to the action of the court prays that the same may be settled, allowed, signed and sealed by this court and made a part of the record in this cause as provided by law.

Dated this 1st day of July, 1932.

Harley W. Gustin, D. Worth Clark, Attorneys for Plaintiff.

Lodged this 1st day of July, 1932.

W. B. Wilson, Clerk, by V. P. Ahlstrom, Deputy Clerk.

Received copy of the foregoing Bill of Exceptions this 1st day of July, A. D. 1932.

Bagley, Judd & Ray, Attorneys for Defendant.

[fol. 60] Comes now the defendant, Travelers Protective Association of America, by and through its attorneys of record, Bagley, Judd and Ray, and consents to the allowance and settlement of the foregoing Bill of Exceptions constituting and containing all of the evidence and pro-

ceedings had on the trial of said cause; all amendments proposed by said defendant having been consented to by said plaintiff and engrossed therein.

Dated this 11th day of July, A. D. 1932.

Bagley, Judd & Ray, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

ORDER SETTLING BILL OF EXCEPTIONS

The foregoing Bill of Exceptions having been duly proposed, served and lodged with the clerk of said court within the time allowed by law and timely orders of this court and all the amendments proposed thereto by the defendant having been duly allowed and engrossed therein, and said Bill of Exceptions and the settlement and allowance thereof having been approved by said defendant and being now presented to the undersigned judge of said court before whom said cause was tried and said proceedings had, the same is now certified by me to be full, true and correct and to constitute and contain all of the evidence offered or introduced, proceedings had and exceptions taken on the trial of said cause and is hereby signed, certified, allowed, settled and sealed by me as plaintiff's Bill of Exceptions; and

It Is Hereby Ordered that said Bill of Exceptions be filed and made a part of the record in said cause.

Tillman D. Johnson, District Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME IN WHICH TO PREPARE, SERVE AND LODGE BILL OF EXCEPTIONS

At this 16th day of June, 1932, comes plaintiff by H. W. Gustin, her attorney, and on his motion it is ordered that plaintiff be given to July 9, 1932, within which to prepare [fol. 61] and lodge bill of exceptions, and it is further ordered that said plaintiff may withdraw exhibits 1 to 17 for preparation of transcript on appeal.

IN UNITED STATES DISTRICT COURT

NOTICE OF HEARING ON APPLICATION TO SETTLE BILL OF EXCEPTIONS—Filed July 7, 1932

To defendant above named and its attorneys, Bagley, Judd & Ray:

You And Each Of You will please take notice that on Tuesday, the 12th day of July, 1932, at the hour of 10:00 o'clock a. m., or as soon thereafter as counsel may be heard at the chambers of the Honorable Tillman D. Johnson, judge of the above entitled court, at Ogden, Weber County, State of Utah, plaintiff will ask said court to settle, allow, sign and seal her proposed Bill of Exceptions lodged with the clerk of said court on the 1st day of July, A. D. 1932, and copy of which having been served upon you on said day.

Harley W. Gustin, D. Worth Clark, Attorneys for Plaintiff.

Received copy of the foregoing Notice this 6th day of July, A. D. 1932.

Bagley, Judd & Ray, Attorneys for Defendant.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

PETITION FOR ORDER ALLOWING APPEAL—Filed Aug. 24, 1932

To the Honorable Tillman D. Johnson, District Judge:

The above named plaintiff feeling aggrieved by the judgment rendered and entered in the above entitled cause on the 1st day of June, A. D. 1932, does hereby appeal from said judgment as entered in said District Court to the United States Circuit Court of Appeals for the Tenth Circuit for the reasons set forth in the assignment of errors filed herewith, and she prays that her appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said judgment was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the

[fol. 62] Tenth Circuit under the rules of such court in such cases made and provided.

And your petitioner further prays that the proper order relating to the required security to be required of her, be made.

Harley W. Gustin, D. Worth Clark, Attorneys for Appellant.

Copy of the foregoing Petition for Appeal received this 24 day of August, A. D. 1932.

Bagley, Judd & Ray, Attorneys for Appellee.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed Aug. 24, 1932

Now comes the plaintiff in the above entitled cause and makes and files the following assignment of errors upon which she will rely upon her prosecution of the appeal in the above entitled cause, from the judgment made and entered herein by this Honorable Court on June 1st, 1932.

The United States District Court in and for the District of Utah, Central District, erred in the trial and decision of said cause in the following particulars:

I

The court erred in sustaining defendant's motion for directed verdict in favor of said defendant and against the plaintiff and made at the close of all of the evidence.

II

The court erred when, upon motion of the defendant and at the close of all of the evidence, it directed a verdict for the defendant against the plaintiff for no cause of action.

III

The court erred in not submitting for determination the issues between the parties, to the jury.

[fol. 63]

IV

The court erred in rendering and entering judgment upon the verdict herein and the same is against law for the rea-

son that the said verdict is not supported by the evidence, there being no evidence whatever in said cause justifying the said verdict.

Wherefore plaintiff prays that said judgment be reversed and that the United States District Court in and for the District of Utah, Central Division, be ordered to enter a judgment reversing said judgment.

Harley W. Gustin, D. Worth Clark, Attorneys for Appellants.

Copy of the foregoing Assignment of Errors received this 24th day of August, A. D. 1932.

Bagley, Judd & Ray, Attorneys for Appellee.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL AND FIXING COST BOND—Filed Aug. 26, 1932

The appeal in the above entitled cause is allowed as prayed and bond fixed in the sum of Three Hundred ($300.00) Dollars, the same to act as a damage and cost bond if appellant fails to make good her plea.

Dated this 25th day of August, A. D. 1932.

Tillman D. Johnson, District Judge.

Copy of the foregoing Order received this 24 day of August, A. D. 1932.

Bagley, Judd & Ray, Attorneys for Appellee.

[File endorsement omitted.]

RECITAL AS TO BOND

[Bond on appeal in the sum of $300, approved by the trial judge, with appellant as principal and New York Casualty Company as surety, was filed in the District Court on August 24, 1932.]

[fol. 64] IN UNITED STATES DISTRICT COURT

ELECTION AS TO PRINTING—Filed Aug. 24, 1932

Comes now the above named appellant and hereby elects to have the printing of the transcript in the above entitled cause done under the supervision and direction of the Circuit Court of Appeals.

Dated this 24th day of August, A. D. 1932.

Harley W. Gustin, D. Worth Clark, Attorneys for Appellant.

Copy of the foregoing election as to printing received this 24th day of August, A. D. 1932.

Bagley, Judd & Ray, Attorneys for Appellee.

[File endorsement omitted.]

RECITAL AS TO CITATION

[Citation in proper form, directed to appellee, was issued on August 25, 1932, and on the same day service of said citation was accepted by counsel for said appellee.]

IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Aug. 24, 1932

The clerk of this court is hereby directed to prepare and certify a transcript of the record in the above entitled cause to the United States Circuit Court of Appeals for the Tenth Circuit by including therein the following:

1. Complaint.
2. From removal proceedings.
(a) Petition for removal.
(b) Order for removal.
(c) Bond for removal.
3. Answer.
4. Reply.
5. Minute order of court directing verdict.
6. Verdict.
7. Judgment.

[fols. 65 & 66] 8. Bill of Exceptions with Order approving same.

9. Minute order, dated June 16th, extending time in which to prepare, serve and lodge Bill of Exceptions.

10. Notice of hearing on application to settle Bill of Exceptions.

11. Petition for order allowing appeal.

12. Assignment of Errors.

13. Order allowing appeal and fixing cost bond.

14. Bond and approval thereof.

15. Citation.

16. Præcipe for record.

17. Election as to printing.

18. Clerk's certificate.

Dated this 24th day of August, A. D. 1932.

Harley W. Gustin, D. Worth Clark, Attorneys for Appellant.

Received copy of the foregoing Præcipe for Transcript of Record this 24th day of August, A. D. 1932.

Bagley, Judd & Ray, Attorneys for Appellee.

[File endorsement omitted.]

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 67] Minute entry of argument and submission, January 16, 1933, omitted in printing.

IN UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT, APRIL TERM, 1933

No. 752

Mr. J. H. Peterson and Mr. Harley W. Gustin (Mr. D. Worth Clark was with them on the brief), for appellant.

Mr. Paul H. Ray and Mr. Robert L. Judd (Mr. Emmett M. Bagley was with them on the brief), for appellee.

Before Lewis, Phillips and McDermott, Circuit Judges

OPINION—June 22, 1933

Lewis, Circuit Judge, delivered the opinion of the court.

Appellant brought this suit as the named beneficiary in a certificate of membership that had been issued to her husband by appellee, a Missouri corporation. The certificate provides for payment of $5,000 to the beneficiary, "Whenever a member in good standing shall, independently of all other causes, through external, violent and accidental means, receive bodily injuries which shall solely and exclusively cause death * * *." It is not questioned or doubted that the member James Prinsen, appellant's hus- [fol. 68] band, was a member in good standing on February 3, 1931, when he came to his death in the manner stated supra in the certificate. He was killed at a highway crossing when an auto truck loaded with dynamite caps, on which he was riding, was struck by an engine of a passenger train.

The defense is bottomed on two provisions of appellee's Articles of Incorporation and its By-Laws, made a part of the certificate by reference, which read thus:

"This Association shall not be liable to a member or his beneficiary for * * * death benefits * * * when a member is participating * * * in the moving or transportation of gunpowder, dynamite, or other explosive substance or substances; * * * when the result of voluntary or unnecessary exposure to danger or to obvious risk of injury; * * *."

After both parties had adduced evidence, the court sustained appellee's motion for an instructed verdict, and that ruling is assigned as error.

The material facts are these: James Prinsen became a member of the association in 1915. At that time he was a salesman for the Western Powder Company, and so stated in his application. At the time of his death he was a director and assistant-secretary of that company. A few days before Prinsen's death the Tintic Powder and Supply Company gave an order to the Hercules Powder Company for 300,000 dynamite caps. These three companies all appear to have business offices in Utah. The Hercules Com-

pany asked the Western Company to fill the order. The request was received by Mr. Prinsen, and he was notified at the time that Mr. Begaman would come to Salt Lake City for the caps within the next day or so. The order was received and written up by Mr. Prinsen. Within a day or so and on February 3, 1931, Begaman came with an auto truck to receive the caps. They were in a magazine north of and outside of Salt Lake City. When Begaman came Prinsen took the key to the powder magazine and went with Begaman to deliver to him the caps. Delivery being made, he got on the truck and sat on the seat by Begaman for the purpose of riding back to Salt Lake City. This seems a reasonable inference. The truck was owned by the Tintic Company. As Begamen drove easterly on the highway he [fol. 69] came to the railway crossing, drove upon it, and the rear end of the truck was struck by the engine of the passenger train and thrown from the track. There was a terrific explosion of the dynamite caps. Prinsen was sitting on the south side of the truck by the driver. Prinsen, Begaman, and the engineer on the railway engine were all killed, and the fireman on the engine was rendered unconscious, but later recovered. The accident occurred about 2:40 P. M. There were the usual railway warning signals at such crossing. After the collision the wreckage of the truck was north and east of the crossing in a depression below the rails approximately forty or fifty feet from the track. There are buildings about the crossing. The signs that appear on them in photographs indicate that some of them are a plant of Cudahy Packing Company. There were some obstructions of the view of the approaching train along the highway, but these were at intervals, and it is clear from the proof that Begaman and Prinsen had ample opportunity to have seen the approaching train had they looked in that direction before they reached the crossing. The fireman saw the truck when the train was about 250 feet from the crossing. The train was then moving at a speed of about forty miles per hour, and he estimated the speed of the truck at fifteen or sixteen miles per hour. He also saw two men in the truck sitting in the covered cab side by side and that the truck was loaded with boxes. The brakes were applied to the railway engine. When it struck the truck it was running at approximately twenty-five miles per hour. There was no proof and it

seems improbable that any can ever be adduced tending to show that Prinsen or Begaman saw or heard the train.

The question is whether the court erred in not submitting the case to the jury. The District Judge in ruling on the motion for directed verdict held that Prinsen "was both participating in moving and transporting these dynamite caps, and that under the circumstances of the case he voluntarily and unnecessarily exposed himself to a very obvious risk of injury." Each of the propositions thus announced constitutes a decision of fact, and we are constrained to hold that each presented an issue for determination by the jury. Participation in the moving or transportation of a thing requires action, effort, or direction. It is not an unreasonable inference that the sole purpose of Prinsen in getting on the truck with Begaman was to ride back to [fol. 70] Salt Lake City, that he took no part in the operation of the truck, nor gave directions in that respect, nor made suggestions as to its speed, nor in any manner took part with Begaman in its operation. Of course, the dynamite caps while in the truck could not be moved or transported without moving the truck. We had occasion to consider the definition of the word "participate" in Head v. N. Y. Life Ins. Co., 43 F. (2d) 517. There is no proof as to what Prinsen did or did not do while riding with Begaman from the magazine to the railway crossing. That lies wholly in inference from the facts and circumstances of the case, and a reasonably prudent person might infer that he was wholly indifferent and passive as to Begaman's control of the truck and thereby the moving and transportation of the dynamite caps at the time of the accident. No occasion requiring Prinsen's assistance appears, unless he saw the train when the impulse of self preservation would have caused him to tell Begaman to stop. Nor does it appear to us a necessary and unavoidable inference that Prinsen in riding on the truck or in remaining there when Begaman drove it on the railway track voluntarily or unnecessarily exposed himself to danger or to an obvious risk of injury. We are not advised by any proof in this case as to the probability of explosions of dynamite caps while being transported in a truck over an ordinary country highway. Mr. Prinsen probably was informed on that subject, but we think ordinarily a court and jury are not. Nor is there proof that Mr. Prinsen knew the train was near just before the automobile was driven on the railway

track. If he or Begaman knew that fact the natural impulse of Begaman would have been to stop and of Prinsen to warn Begaman that he stop. The certificate does not exclude liability should the member's death result from his negligence or occur when he was negligent. So we think it cannot be said that the only reasonable inference from the facts and circumstances of the case is that Prinsen voluntarily and unnecessarily exposed himself to an obvious risk or injury when the automobile was driven on the railway crossing.

The opinion of Judge Lurton in Mt. Adams & E. P. Inclined Ry. Co. v. Lowry, 74 Fed. 463, widely cited on the power and duty of a court to direct a verdict, contains this:

"It seems to us to follow from both reason and authority, that there is a difference between the legal discretion of the court to set aside a verdict as against the weight [fol. 71] of evidence, and that obligation which the court has to withdraw a case from the jury, or direct a verdict, for insufficiency of evidence. In the latter case it must be so insufficient in fact as to be insufficient in law; in the former case it is merely insufficient in fact, and it may be either insufficient in law, or may have more weight, and not enough to justify the court, in exercising the control which the law gives it to prevent unjust verdicts, to allow a verdict to stand. * * * We do not think, therefore, that it is a proper test of whether the court should direct a verdict, that the court, on weighing the evidence, would, upon motion, grant a new trial. A judge might, under some circumstances, grant one new trial and refuse a second, or grant a second and refuse a third. In passing upon such motions he is necessarily required to weigh the evidence, that he may determine whether the verdict was one which might reasonably have been reached. But, in passing upon a motion to direct a verdict, his functions are altogether different. In the latter case we think he cannot properly undertake to weigh the evidence. His duty is to take that view of the evidence most favorable to the party against whom it is moved to direct a verdict, and from that evidence, and the inferences reasonably and justifiably to be drawn therefrom, determine whether or not, under the law, a verdict might be found for the party having the onus. If not, he should, upon the ground that

the evidence is insufficient in law, direct a verdict against that party."

We do not think the evidence in the present case measures up to the rule deduced by Judge Lurton from the many controlling authorities which he reviewed.

Mr. Justice Harlan, sitting with the Court of Appeals in the Sixth Circuit, delivered the opinion in Travelers' Ins. Co. v. Randolph, 78 Fed. 754, in which he said:

"The court may be of opinion that, according to the weight of the testimony, a verdict should be returned for the party asking a peremptory instruction. But it may not, for that reason alone, give such an instruction. It may not take the case from the jury, on issues of fact, [fol. 72] unless the evidence is so distinctly all one way that a different view of it would shock the judicial mind."

In that opinion he also considered the import to be given to the words "voluntary exposure to unnecessary danger" in accident policies, and concluded that those words are to be held as importing an exposure by the assured to an unnecessary danger with the intention or design at the time to risk the consequences of such exposure, that those words are not equivalent of ordinary negligence, and that "a degree of consciousness of danger is necessary before there would be that voluntary exposure to unnecessary danger required to prevent indemnity."

On the first point supra see Slocum v. Ins. Co., 228 U. S. 364, 369; Small Co. v. Lamborn & Co., 267 U. S. 248, 254; Felton v. Spiro, 78 Fed. 576; and on the second point see Ashenfelter v. Employers' Liab. Assur. Corp., 87 Fed. 682; Standard Life & Acc. Ins. Co. v. Thornton, 100 Fed. 582; Preferred Acc. Ins. Co. v. Muir, 126 Fed. 926; Zurich Gen. Acc. & Liab. Ins. Co. v. Flickinger, 33 F. (2) 853; Whalen v. Peerless Cas. Co., 75 N. H. 297, 73 Atl. 642; Keene v. New England Mut. Acc. Ass'n, 161 Mass. 149, 36 N. E. 891; S. C., 164 Mass. 170, 41 N. E. 203; Rowe v. United Comm. Trav. Ass'n, 186 Ia. 454, 172 N. W. 454; Payne v. Fraternal Acc. Ass'n, 119 Ia. 342, 93 N. W. 361; Walter v. People's Health & Acc. Ins. Co., 173 Mich. 581, 139 N. W. 865. The cases in the state courts do not appear to be in entire harmony. Diddle v. Continental Cas. Co., 65 W. Va. 170, 63 S. E. 962, is not in accord with those cited above. Some

difference in phraseology of exempting clauses are in part at least responsible for this difference. But we think the facts in the case under consideration and the inferences that could be appropriately drawn from them made a case for the jury, and that the District Judge erred when he in effect held that on the proof plaintiff's case was insufficient in law.

Reversed and Remanded.

IN UNITED STATES CIRCUIT COURT OF APPEALS

DISSENTING OPINION

McDERMOTT, Circuit Judge, dissenting:

In Head v. New York Life Ins. Co. (C. C. A. 10), 43 F. (2d) 517, the insured met his death while riding in an airplane, but not flying it; he was not a passenger in the accepted sense of the word, for he was in the plane to get [fol. 73] information necessary for writing a policy on the plane. Suit was brought on an accident policy which did not cover death "resulting from participation as a passenger or otherwise in aviation or aeronautics." The trial court sustained a demurrer to the petition and this Court affirmed. The word "participate" was there distinguished from the word "engage," and was held to mean "to take or have a part or share in." I am satisfied with that decision and that definition. By the same token, it seems to me that one riding on a truck-load of dynamite caps is "participating in the moving or transporting thereof."

There is another reason, to me more impressive. In construing insurance contracts, the same search should be made to ascertain the intent of the parties as in other contracts, and the language used ought to be taken in its "plain, ordinary and popular sense." Chase v. Business Men's Assur. Co. (C. C. A. 10) 51 F. (2d) 34. The purpose of a clause may also be looked to if the words used are not clear. Both the language and the purpose of this clause seem clear to me. There is a hazard attendant upon the transportation of explosives—a hazard which the deceased shared equally with the driver on the seat beside him. The parties intended to, and I think did, agree that such hazard was not a risk insured against.

In any event, I see nothing to go to the jury. The facts are not in dispute; in fact, they were largely stipulated. Whether such facts disclose that deceased was participating in the transportation of explosives depends upon the meaning of the word "participating," as used in this written contract, which is a question for the court and not the jury. Since I think the deceased was so participating when he met his death, I think the judgment below should be affirmed.

IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT—June 22, 1933

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Utah and was argued by counsel.

[fol. 74] On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed; that this cause be and the same is hereby remanded to the said District Court for a new trial; and that Uluetta Prinsen, appellant, have and recover of and from The Travelers Protective Association of America, a corporation, appellee, her costs herein and have execution therefor.

IN UNITED STATES CIRCUIT COURT OF APPEALS

PETITION FOR REHEARING—Filed July 24, 1933

Petitioner, The Travelers Protective Association of America, appellee in the above entitled cause, respectfully but earnestly petitions this court to grant a rehearing in order that an opportunity may be afforded for a further and fuller hearing on the interpretation of the contract considered in the two opinions herein, and on which this court divided, and in support of this petition appellee represents:

1. That this court has erred in reversing the judgment of the District Court;

2. That this court has erred in refusing to hold and decide as matter of law that James Prinsen was at the time

of his death participating in the moving or transportation of explosives contrary to the provisions of the benefit certificate involved in this case;

3. That the majority opinion of this court in this case, if allowed to stand, will create a conflict with another decision of this court (Head v. New York Life Ins. Co., 43 Fed. (2d) 517) and with a decision of the Fifth Circuit (Pittman v. Lamar L. I. Co., 17 F. (2d) 370);

4. That the majority opinion in this case fails to recognize and apply the now well settled legal distinction between the terms "engaged in" and "participating in" as those terms are used in accident insurance policies and as they have heretofore been uniformly interpreted by this Court and other federal and state courts;

5. There is no ambiguity about the meaning of the word participate. It has a well settled meaning, adopted by all the courts without exception, which has heretofore been [fol. 75] followed and adopted by this court—hence this case presents a question of law for this court and not a question of fact for a jury.

Wherefore, we respectfully but confidently submit that if this court will grant our petition for rehearing and reopen this case for further consideration, we believe it can be shown, and will be found by this court, that this petition for rehearing is not presented simply because we are disgruntled or disappointed with the result but is earnestly presented for the purpose of securing for the parties and the court an opportunity to give fuller consideration to an opinion which is in conflict with other decisions of this court and other Federal and State courts.

Respectfully submitted.

Emmett M. Bagley, Robert L. Judd, Paul H. Ray,
Attorneys for Petitioner.

Certificate of Counsel

I, Emmett M. Bagley, one of the attorneys for the appellee, do hereby certify that I have carefully examined and considered the foregoing petition for rehearing, know the contents thereof, and that in my opinion the same is well

founded in point of law and is not made for the mere purpose of delaying the determination of said cause.

Emmett M. Bagley.

[File endorsement omitted.]

In United States Circuit Court of Appeals

Order Denying Petition for Rehearing—July 27, 1933

This cause came on to be heard on the petition of appellee for a rehearing herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that the said petition be and the same is hereby denied.

[fol. 76] In United States Circuit Court of Appeals

Motion to Stay Issuance of Mandate—Filed Aug. 2, 1933

Comes now The Travelers Protective Association of America, the appellee in the above entitled cause, and shows to this court:

That on the 22nd day of June, 1933, this court made and entered its order and decision reversing the judgment of the trial court; that thereafter, and on the 27th day of July, 1933, an order was made herein overruling appellee's motion for a rehearing.

That appellee intends with all reasonable expedition to apply to the Supreme Court of the United States for a writ of certiorari to review the proceedings and judgment had herein, and for such reason desires that the issuance of a mandate in this action be stayed.

Wherefore appellee prays that the mandate of this court be stayed and withheld for a period of thirty days.

Dated this 31st day of July, 1933.

E. M. Bagley, Robert L. Judd, Paul H. Ray, Attorneys for Appellee.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING MANDATE—Aug. 4, 1933

This cause came on to be heard on the motion of appellee for a stay of the mandate herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that no mandate of this court issue herein for a period of thirty days from this day, and that, if within said period of thirty days there is filed with the clerk of this court a certificate of the clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, with proof of service thereof under Section [fol. 77] 3 of Rule 38 of the Supreme Court, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 78] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 23, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 38,032. U. S. Circuit Court of Appeals, Tenth Circuit. Term No. 429. The Travelers Protective Association of America, petitioner, vs. Uluetta Prinsen. Petition for writ of certiorari and exhibit thereto. Filed September 5, 1933. No. 429, O. T., 1933.

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IN THE

Supreme Court of the United States

October Term, 1933.

THE TRAVELERS PROTECTIVE ASSOCIATION OF AMERICA,
Petitioner and Appellee below

vs.

ULUETTA PRINSEN,
Respondent and Appellant below

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, The Travelers Protective Association of America, respectfully represents to this court:

By express provision in its articles of incorporation and by-laws the fraternal benefit association here involved not only did not agree to pay benefits, but expressly refused to insure, where death resulted while a member was "participating * * * in the moving or transportation of gunpowder, dynamite, or other explosive substance". (R. 25)

When killed, James Prinsen, the member whose death is the subject of this suit, was admittedly riding on a truck carrying a load of 300,000 dynamite caps which exploded when the automobile came into collision with a train at a railroad crossing.

The Tintic Powder & Supply Company had ordered 300,000 dynamite caps from the Hercules Powder Company, stating that Mr. Begaman, its truck driver, would be in for

those caps within the next day or so. (R. 31) The Hercules Powder Company telephoned that order to its agent, the Western Powder Company, where it was "received and written up by Mr. Prinsen". (R. 31) Thereafter, within a day or so, Begaman came with his truck to get the dynamite caps and with Prinsen drove out to the magazine where the powder was kept, north of Salt Lake City, just over the line in Davis County (R. 31); *"that Mr. Prinsen took the key to the powder magazine to effect the delivery of these caps;* that after he effected the delivery of the caps he got upon the automobile of Mr. Begaman in which the dynamite caps had been loaded and rode from the magazine to the place of the collision with the Denver & Rio Grande train, which was at a point called the Cudahy crossing just north of Salt Lake". (R. 31)

At the trial all the foregoing facts were by counsel for the parties stipulated in evidence (R. 30)—hence, as stated by trial Judge Johnson in the opinion he delivered when he directed a verdict in favor of the defendant, "none of them" (the facts) "being in dispute" (R. 59) there is really no conflict in the evidence on any material point in the case.

Looking to the proofs of death furnished by the beneficiary—which are binding on the assured—Mutual Life Ins. Co. v. Newton, 22 Wall. 32; 89 U. S. 32; 22 L. ed. 793-5; Hassencamp v. Mut. Ben. L. Ins. Co., 120 Fed. 475—(referred to as Exhibit "B", and called Statement of the Beneficiary and Proof and Notice of Loss—R. 17) we find it containing (Defendant's Exhibit 1) the Attending Physician's Statement (R. 20) in which in answer to the question: "14. What was the precise nature of the injury and its extent?" the following is stated to be the fact: *"Collision between train and truckload of dynamite caps".* (R. 21) Again the following questions and answers are found in the statement of the attending physician furnished by the plaintiff to the defendant Association: "20. What *cause,* in your opinion, *operated* to produce death or contributed thereto? *Blown to pieces.* 21. If an autopsy or post-mortem examination of the body was made, state result? None, as body was mutilated beyond examination."

Plaintiff also furnished, as a part of her proofs of death, on a blank furnished by the Association, an Affidavit of an Eye-Witness (Defendant's Exhibit 2, R. 22) from the fireman on the train which collided with the truckload of dyna-

mite on which Mr. Prinsen was riding, supplying the following facts:

> "At time of accident *which resulted in death of James Prinsen* and two other men, I was acting as fireman on the D. & R. G. W. R. R. passenger locomotive involved in the accident, on train No. 3 going north from Salt Lake City. My recollection of the event is that as the train neared the Cudahy Packing crossing at North Salt Lake, I saw a truck approaching from the west and supposed same would stop before getting on track. *Almost immediately a collision and explosion occurred* which resulted in the death of engineer at my side and myself becoming unconscious."

On these facts Judge Tillman D. Johnson, District Judge for Utah, directed a verdict for defendant (R. 53-59). The Circuit Court of Appeals for the Tenth Circuit, by a divided court, reversed the judgment (R. 73) and thereafter denied a rehearing (R. 75).

REASONS RELIED ON FOR ALLOWANCE OF WRIT

I. The correct interpretation and proper construction of an exemption clause which is shown by the decided cases to be in common and general use in accident insurance policies and benefit certificates of fraternal societies, and on which the Tenth Circuit Court of Appeals is in apparent disagreement with other courts, is a matter of such public interest and concern as to deserve final settlement by this court.

II. By the majority opinion in this case the Tenth Circuit Court of Appeals has rendered a decision which is in conflict with a prior decision of that court, and which is also in conflict with a decision of another circuit court of appeals on the same question, and has decided that question in such a way as to bring its decision herein in conflict with the decisions of such of the state courts as have passed on the question.

WHEREFORE your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the United States Circuit Court of Appeals for the Tenth Circuit, commanding said court to certify and send to this court a full

and complete transcript of the record and of the proceedings of said court had in the case numbered and entitled on its docket, No. 752, Ulnetta Prinsen, appellant, vs. The Travelers Protective Association of America, appellee, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the judgment herein of said United States Circuit Court of Appeals for the Tenth Circuit be reversed by this court, and for such further relief as to this court may seem proper.

Dated this 28th day of August, A. D. 1933.

EMMETT M. BAGLEY,
PAUL H. RAY,
Attorneys for Petitioner.

ROBERT L. JUDD,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I.

Opinions of Court Below

The prevailing and dissenting opinions of the Circuit Court of Appeals, dated June 22, 1932, will be found R. 67, 72 and are reported in 65 F. (2d) .....

II.

Jurisdiction

1. The date of the judgment to be reviewed is June 22, 1933, (R. 73), petition for rehearing denied July 27, 1933 (R. 75).

2. The majority opinion in this case, reversing the District Court, is in conflict with the decision of the Fifth Circuit Court of Appeals in *Pittman v. Lamar Life Insurance Co., 17 F. (2d) 370,* in which certiorari was denied by this court, 274 U. S. 750; 71 L. ed. 1331,

3. The majority opinion herein is in conflict with a prior decision of the same court in *Head v. New York Life Ins. Co., 43 F. (2d) 517,* which followed the *Pittman Case, supra.*

4. The interpretation placed in this case on a commonly used clause in fraternal benefit insurance contracts, if allowed to stand, will be in conflict with the decisions of state courts construing the same clause:

Bew v. Travelers Ins. Co., (N. J.) 95 N. J. 533, 112 Atl. 859;
Travelers Ins. Co. v. Peake, (Fla.) 82 Fla. 128, 89 So. 418;
Meredith v. Business Men's Acc. Assn., (Mo.) 213 Mo. App. 688, 252 S. W. 976.

5. The public interest will be promoted by the prompt and final settlement by this court of the question here presented.

III.

Statement of Case

This has already been stated in the preceding petition for certiorari.

IV.

Specification of Errors

1. The Circuit Court of Appeals erred in reversing the judgment of the District Court.

2. The Circuit Court of Appeals erred in refusing to hold and decide as matter of law that James Prinsen was at the time of his death *participating in the moving or transportation of explosives* contrary to the provisions of the benefit certificate involved in this case.

3. The majority opinion in this case fails to recognize and apply the now well settled legal distinction between the terms "engaged in" and "participating in" as those terms are used in accident policies and as they have heretofore been uniformly interpreted by other federal and state courts.

4. There is no ambiguity about the meaning of the word participate. It has a well settled meaning—hence this case presents a question of law for the courts, as held in the dissenting opinion, and not a question of fact for a jury to juggle with, as held in the majority opinion.

V.

ARGUMENT

At the conclusion of the trial District Judge Johnson held in granting defendant's motion for a directed verdict:

> "They were not there by chance, it appears. By prearrangement between the parties referred to in the stipulation the insured, who was employed by a powder company, went out to the powder magazine beyond the railroad track and westerly from the Cudahy Packing Plant for the purpose of getting these dynamite caps in a truck. He had the key to the magazine. • • •

> "Now, he went out there for the purpose of making delivery to the truck driver for the purchaser of the dynamite caps, as I understand the record. What happened at the magazine we don't know. We do know that they went for the purpose of loading these caps into the truck and hauling them away. Whether he assisted in loading, of course, is unknown. And as nothing occurred in that part of the business, it is not of great importance. Having loaded the truck, the driver and the insured got into it and were returning, I presume over the same route that they had used in going to the magazine." (R. 55)

> "But from the time they began to move the dynamite out of the magazine and into the car there was a moving, and in a limited sense a transportation of dynamite caps. If this language in the constitution is to be construed in a very narrow sense, then it would be limited to any act on his part with respect to the moving or transportation of the dynamite caps. But if it is to be construed in the sense that it means having entered upon this business of delivering to the purchaser of the caps bargained for, the order filled, and he went out with the driver of the truck to make delivery, then he became a participant from the time the operation of it began;" (R. 56)

In the majority opinion written by Judge Lewis and concurred in by Judge Phillips the Circuit Court of Appeals held:

> "Participation in the moving or transportation of a thing requires action, effort or direction. It is not an unreasonable inference that the sole purpose of Prinsen in getting on the truck with Begaman was to ride back to Salt Lake City, that he took no part in the operation of the truck, nor gave directions in that respect, nor made suggestions as to its speed, nor in any manner took part with Begaman in its operation."

Judge McDermott in a dissenting opinion, after referring to the prior holding of the court in *Head v. New York Life Ins. Co.*, (C. C. A. 10) 43 F. (2d) 517, said:

> " • • • it seems to me that one riding on a truckload of dynamite caps is 'participating in the moving or transporting thereof.'
>
> "There is another reason, to me more impressive. In construing insurance contracts the same search should be made to ascertain the intent of the parties as in other contracts, and the language used ought to be taken in its 'plain, ordinary and popular sense.' Chase v. Business Men's Assur. Co., (C. C. A. 10) 51 F. (2d) 34. The purpose of a clause may also be looked to if the words used are not clear. Both the language and the purpose of this clause seem clear to me. There is a hazard attendant upon the transportation of explosives—a hazard which the deceased shared equally with the driver on the seat beside him. The parties intended to, and I think did, agree that such hazard was not a risk insured against.
>
> "In any event, I see nothing to go to the jury. The facts are not in dispute; in fact, they were largely stipulated. Whether such facts disclose that deceased was participating in the transportation of explosives depends upon the meaning of the word 'participating', as used in this written contract, which is a question for the court and not the jury. Since I think the deceased was so participating when he met his death, I think the judgment below should be affirmed."

Petitioner respectfully submits and urges that the construction placed by Judge Lewis on the clause involved in the certificate would have been a correct definition if the term "engaged in" had been used in the certificate in this case, as it does occur in many accident policies which have been construed by the courts; but the test applied by Judge Lewis, which fits the "engaged in" provision, is nowhere applied in any other decided case where, as here, the exemption from liability specifically excludes cases occurring while the insured is "*participating in*" specified dangerous undertakings. The two types of policies are entirely different and distinct. As we conceive it the majority opinion overlooks that distinction. Judge McDermott, relying on the decision of the same court in the *Head case, supra,* asserts that "the word '*participate*' was there distinguished from the word 'engage' and *was held to mean* 'to take or have a part or share in.' "

The adjudicated cases which deal with provisions in accident insurance policies excluding risks where the insured is "engaged in" specified activities or occupations, and with which the majority opinion has confused the present case, are:

Gits v. N. Y. L. Ins. Co., (7th C. C. A.)
32 F. (2d) 7;
Sov. Camp W. W. v. Compton, (Ark.)
215 S. W. 672;
Masonic Acc. I. Co. v. Jackson, (Ind.)
147 N. E. 156;
Masonic Acc. I. Co. v. Jackson, (Ind.)
164 N. E. 628;
Ben. Assn. Ry. Emp. v. Hayden, (Ark.)
299 S. W. 995;
Peters v. Prudential Ins. Co.,
233 N. Y. S. 500.

In the following cases the provisions involved excluded liability where, as in this case, the assured was at the time "participating in" certain dangerous risks or hazardous undertakings:

Head v. New York Life, (10th C. C. A.)
43 F. (2d) 517;
Head v. Hartford Acc., (10th C. C. A.)
43 F. (2d) 517;
Pittman v. Lamar L. Ins. Co., (5th C. C. A.)
17 F. (2d) 370;
Bew v. Travelers Ins. Co., (N. J.)
112 Atl. 859;
Travelers Ins. v. Peake, (Fla.)
89 So. 418;
Meredith v. Business Ben's Acc. Assn.,
252 S. W. 976.

In the foregoing cases is pointed out the distinction between policies excluding injuries sustained while "engaged in" aviation and policies exempting risks encountered in "participating in" aviation.

The first class of cases proceeds upon the theory that to be "engaged" in aviation imports something more than a mere single or occasional participation. As held in the *Peters*

Case (233 N. Y. S. 500) supra; "the expression '*engaged* in aviation' should not include a passenger taking an occasional ride in an airplane. If it was so intended, the language is inept and ambiguous and should not be construed against the insured. If it was intended to except occasional rides in an airplane by a passenger, the author of the language should have employed some other expression, *such as 'participating in'.*"

The other type of exemption clause, like the one involved in this case, does not merely prohibit the insured from engaging in the forbidden activity as a business or occupation but does prohibit him from even once, as a passenger or otherwise, exposing himself to the risk of injury from a banned hazard. And, as held by the court in the *Head Case, (43 F. (2d) 517), supra,* there need be no suggestion of the insured contributing effort, it being sufficient to hold as a matter of law that he is *participating* when it is made to appear that the insured was riding with the driver although the pilot alone operated and navigated the plane.

Nowhere has the distinction between the two types of policy provisions "engaged in" and "participating in" been more clearly pointed out than by the lower court in the *Head Case, (43 F. (2d) 517) supra,* in an opinion written by Judge Phillips concurred in by Judge Lewis and Judge McDermott, as follows:

> " 'Engage', is defined in volume 3 of Words and Phrases, Third Series, at page 258, as follows: ' "Engage" means to take part in or be employed in, however the employment may arise;' and at page 259 as follows: 'To "engage" is to embark in a business; to take a part; to employ or involve one's self; *to devote attention and effort'.* The word 'engage' connotes more than a single act or a single transaction; it involves some continuity of action. Guiltinan v. Metropolitan I. Co., 69 Vt. 469, 38 A. 315, 316; Peters v. Prudential I. Co., 133 Misc. Rep. 780, 233 N. Y. S. 500, 501. In the latter case; it was held that the phrase, '*engaged in aviation,*' did not include a passenger taking an occasional ride in an airplane and suggested that if it were intended to include such a passenger it should have employed the expression '*partici-*

pating in'; and pointed out that the word 'engaging' means something more than an occasional participation.

"On the other hand, the word '*participate*' means simply '*to take or have a part or share in,*' and 'participating' means 'a taking part, as in some action or attempt.' New Century Dictionary.

"In Bew v. Travelers' Ins. Co., 95 N. J. Law, 533, 112 A. 859, 860, 14 A. L. R. 983, the court said:

> 'The Standard Dictionary and a number of other dictionaries consulted, define "participate" as meaning "to receive or have a part or share of; to partake of; experience in common with others; *to have or enjoy a part or share in common with others;* partake; as to participate in a discussion." "To take a part in; as to participate in joys or sorrows." '

"One who takes a part in a single action participates therein. The word applies equally to a single act or to many acts.

"This distinction between the phrase 'engage in aviation' and the phrase 'participating in aeronautics' is clearly pointed out in Price v. Prudential Ins. Co., (Fla.) 124 So. 817. *Because of this difference in the meaning of such words, the cases relied upon by counsel for plaintiffs are not in point.*

* * *

"In Meredith v. Business Men's Accident Ass'n of America, 213 Mo. 688, 252 S. W. 976, 978, the court defined 'participating in aeronautics' to mean '*to share* in sailing or floating in the air.'

"Bew v. Travelers' I. Co., supra; Meredith v. Business Men's Ass'n, supra, and Travelers' I. Co. v. Peake, 82 Fla. 128, 89 So. 418, dealt with clauses in insurance policies similar to the clause in the instant case *and in each of the above cases it was held that a passenger in an airplane flying the air, was participating in aeronautics.* See, also, Pitt-

man v, Lamar L. I. Co., (C. C. A. 5th) 17 F. (2d) 370.

> "We think there can be no doubt that a person who rides in an airplane, along with the pilot who operates and navigates the airplane, has a part or share with such pilot in flying in the air and is participating in aeronautics."

In the light of the foregoing *prior* decision of the lower court we respectfully submit that the holding in that case is in direct conflict with the holding in the majority opinion in this case. The two holdings cannot be reconciled.

If the lower court was correct in first saying in the *Head Case (43 F. (2d) 517) supra:* "We think there can be no doubt that a person *who rides* in an airplane, along *with the pilot who operates and navigates the airplane,* has a part or share with such pilot in flying in the air and *is participating in aeronautics",* then Judge Lewis is certainly wrong in the instant case in basing the opinion on the proposition there stated that "Participation in the moving or transportation of a thing *requires action, effort or* direction"; and clearly the majority opinion, as written, ignores the now established and well recognized distinction between a clause exempting liability where one is engaged in a certain activity or occupation and those clauses which exclude liability where one is merely participating in a specified hazardous undertaking.

It is not the mere *act* of participating in the movement or transportation of explosives against which the exemption clause here involved is directed. It is the obvious danger and hazard of going into close proximity to such a highly dangerous agency, particularly when it is being handled or moved —when and whereby the danger of explosion is greatly increased—that the Association in this case declined to insure against. Prinsen's presence on the moving truck which was transporting the load of dynamite caps made him a participant in its movement and brought him for the time within the very inhibition of the policy against exposing himself to risk of injury from that source. And when we recall that it is admitted in the record now before this court that Prinsen was on the truck at the scene of the accident in the course of his employment, and that the sole purpose of his trip to and from the powder magazine had to do only with the dynamite caps

his employer was furnishing through him to its customer, it is clear that Prinsen intentionally and deliberately came into and remained in close proximity to the dynamite caps while they were being transported from the powder magazine to the point of the accident, and had participated and was participating in the transaction involving the movement of the dynamite caps from its beginning until its fatal ending.

The whole basis for and theory of the majority opinion in this case is that Prinsen was not "participating" in the movement or transportation of the dynamite caps because he was merely *riding on* the auto truck which was loaded with the dynamite caps and was not taking an active part in the driving or operation of the truck. That is shown by the foregoing quotation from the majority opinion.

That the majority opinion does not correctly express the true meaning of the term *participate* can, we respectfully submit, be demonstrated by a reading of the decided cases construing that word.

In the *Head Cases, (43 F. (2d) 517) supra,* one of the policies excluded liability where the insured was injured "while *participating* in or in consequence of *participating* in aeronautics" (p. 521) and Judge Phillips points out in the opinion that Head took no part in the operation of the airplane, exercised no direction over it—just as Judge Lewis says Prinsen did not do—and states that Head merely went to the airport to get information concerning an airplane preparatory to writing a policy insuring it against fire, theft and tornado; "that the pilot of such airplane suggested that insured *'take a ride'* in the airplane for the purpose of gathering such information as might be needed in preparing the application for and writing such insurance; that the insured boarded such airplane *and the pilot set it in motion;"* and in about six minutes it crashed to the ground and was wrecked, killing Head.

There was, we respectfully submit, just as much "participation" by Head in the airplane ride as there was by Prinsen in the ride on the truck load of dynamite caps. It may properly be asked, we think, what "action, effort, or direction" Head exercised in or over the operation of the airplane, that justified the lower court in that case holding as *matter of law* that Head was debarred from recovering be-

cause he was *participating* while merely riding in the airplane, that can be pointed to to support a distinction between what Prinsen did or did not do while riding on the truck load of dynamite caps? In the majority opinion in our Prinsen case it is stated "that he took no part in the operation of the truck, nor gave directions in that respect, nor made suggestions as to its speed, nor in any manner took part with Begaman in its operation". In answer to this attempted distinction we call the court's attention to the fact that Head took no part in the operation of the airplane, and gave no directions in that respect, and made no suggestions as to its speed, nor in any manner took part with the pilot who alone "set it in motion" and operated it until it fell. Is it really a matter of any concern in this case that, as the court points out, it may be inferred "the sole purpose of Prinsen in getting on the truck with Begaman was to *ride back* to Salt Lake City"? That was all Head was doing. He entered the airplane because the pilot "suggested that insured *take a ride*" therein, and the court winds up its opinion in that case by saying: "We think there can be *no doubt* that a person *who rides* in an airplane, along with the pilot who operates and navigates the airplane, *has a part or share with such pilot in flying in the air* and *is participating* in aeronautics".

The only other federal court case coming to our attention is that from the Fifth Circuit Court of Appeals (1927) of *Pittman v. LaMar Life Insurance Company, 17 F. (2d) 370* (in which certiorari was denied by this court, 274 U. S. 750; 71 L. ed. 1331) where the policy in question contained a provision that "*participation* in * * * aeronautic * * * activity, either as a passenger or otherwise" limited the recovery to the cash premiums paid, and the insured there was struck and killed by the propeller blade of the airplane as he was walking away from the machine *after* having completed a flight with his partner as operator. There was no showing there that Pittman had taken any part in the operation of the airplane; to the contrary, it affirmatively appears from the opinion that Bailey, the partner, had operated the airplane and that Pittman had only been a passenger therein. Circuit Judge Walker pointed out:

> "The language used requires the conclusion that, though the trip or aeronautic expedition in which the insured had been taking part ended prior to

his death, the insurer's liability was limited to the cash premium paid, if the insured's death occurred *while he was participating* in an aeronautic activity. The term 'aeronautic activity' is broad enough to cover what is ordinarily incident to an airplane trip. The aeronautic activities of one who takes such a trip do not begin or end with the actual flight, but include his presence or movements in or near to the machine incidental to beginning or concluding the trip. The quoted provision shows that the *insurer did not consent to insure against the hazards incidental to an airplane trip.* The insured incurred those hazards, and his death resulted from his remaining exposed to one of them. *We are of the opinion that his presence at the place where he was killed was so immediately connected with and incidental to the airplane trip he took as to require the conclusion that his death occurred while he was participating in an aeronautic activity.*"

If the foregoing opinion contains a correct interpretation of the word "participate"—and we may fairly assume even the lower court will not say it does not, because it cited it approvingly in the *Head Case, supra,* in support of the proposition there announced by the lower court "that a passenger in an airplane, flying in the air *was participating in aeronautics*"—then it must necessarily follow, as held in that case and in the Head Case, that in order to *participate* in a forbidden activity, such as riding in an airplane or on a truck load of dynamite caps, it is not essential to a finding as a matter of law that such participation was a risk not assumed under, but is expressly excepted from, the policy, to show the insured was directing the operation of the machine or making suggestions as to its speed or management. As stated by Judge Walker in the *Pittman Case (17 F. (2d) 371), supra,* "the quoted provision shows that the insured did not consent to insure against the hazards incidental to an airplane trip. *The insured incurred those hazards, and his death resulted from his remaining exposed to one of them,*" just as Prinsen incurred the hazard incident to an explosion of dynamite when he was engaged in delivering the dynamite caps at the powder magazine and continued to remain exposed to that hazard when he boarded the truck loaded with the dynamite caps to ride back to town.

In the *Bew Case (112 Atl. 859) supra,* the provision in the policy exempted liability for fatal injuries sustained "while participating in or in consequence of having participated in aeronautics". Bew entered an exhibition airplane as a passenger, took no part in its operation, and was merely seated "beside the pilot" when the plane went into a "nose dive" and he was killed when it fell to the earth. The attorney for the assured there argued, as the majority opinion in this case apparently holds, that to "participate" one must exercise some management or control over the instrumentality; but the court in that case thus answered that argument:

> "Plaintiff insists that *one participates only* when he is *physically active* in the management and control of an instrument or agency, . . .
>
> "There is nothing in the definition given, or in the common use of the term, to confine it to those who are active in the piloting of air vessels and to exclude those *who are inactive users thereof.* If it had been intended to confine the application of this provision to those who pilot or manage the physical operations of such vessels, it would probably have been expressed by using some such language as '*engaging* in the piloting, management, or operation of aeronautical vessels'."

In the *Peake Case (89 So. 418), supra,* the court squarely holds that it is not necessary for one to take active part in the operation or management of the vehicle or instrumentality in order to be held in law to have participated in its movement, saying:

> "A passenger in an airplane flying in the air, *whether he takes part in the operation of the airplane or not, is 'participating* in aeronautics' within the intent and meaning of the provision specifically excepting such a risk from the indemnity contract contained in the policy."

In the *Meredith Case, (252 S. W. 976) supra,* where the policy did not cover death occurring while "participating" in aeronautics, and the petition alleged that deceased was killed while "riding, as a passenger for hire, in a" plane, the

court holds squarely against the construction or interpretation placed by the majority opinion in this case upon the word "participate", saying:

> *"There is no implied meaning of contributing effort, nor that one participating is the creator or cause of that in which he participates."*

We believe we have herein referred to every case involving the legal construction or interpretation of clauses excluding liability for accidents occurring while *participating* in a forbidden hazardous venture. In no decided case we have been able to find has it been held by any court that the "participation contracted against" is only that which, as the majority opinion here holds, contemplates "action, effort, or direction".

Each and every one of the cases above quoted from, including the former decision of the Tenth Circuit Court of Appeals in the *Head Case (43 F. (2d) 517) supra,* expressly and explicitly repudiates the idea that in order to have participated in the movement or transportation of the dynamite caps it was required that Prinsen should have taken some active part in the driving or operation or control of the automobile truck which was loaded with the dynamite caps. Only one of them could drive the truck; but surely both could have been, and were, participating in the movement or transportation of the dynamite caps. If this is not true in this case then no two persons could participate in the transportation of a truck load of dynamite where only one can drive the truck. If this is not true in this case then every case cited in this brief, including the *Head Case* by the same court, was erroneously decided, for in none of them was the insured doing more than sitting in the conveyance and taking no part in its actual operation and contributing no "action, effort or direction toward its movement".

When we look to the record in this case to see the extent to which Prinsen actually participated in the movement and transportation of the dynamite caps in question we find that his participation consisted of considerably more than merely riding on the truck at the time it was hit by the train. He had "received and written up" at the office of his employer the order for the 300,000 dynamite caps in question (R. 31). He had been notified that Begaman, the truck driver of the customer who had ordered the dynamite caps, would come to

Salt Lake for them within the next day or so" (R. 31). Within the time specified Begaman appeared at the office of the Powder Company and Prinsen drove out with him on the truck in question to the magazine where the powder was stored, north of Salt Lake City just over the line in Davis County (R. 31).

Will this court say that it is a disputed question of fact for a jury to decide whether Prinsen on the occasion in question had been and was exposing himself to hazards incidental to the movement and transportation of dynamite caps when the record shows it was admitted and stipulated by the parties at the trial that

> "Mr. Prinsen took the key to this magazine and went over with Mr. Begaman on his truck and effected delivery of the powder and was returning on the truck when the accident happened." (R. 32)

What more is it necessary for your petitioner to show to enable this court to say as matter of law that on the occasion in question Prinsen had participated, and at the time of his death was participating, in the movement and transportation of the truck load of dynamite caps in question? If, as Judge Phillips holds in the *Head Case, (43 F. (2d) 517), supra,* "the word 'participate' means simply 'to take or have a part or share in'," surely Prinsen on the occasion in question was participating in the movement and transportation of dynamite, and was sharing with the driver in the risk incident to its movement, and was just as much exposed to that risk as though he had been driving, and his death occurred while he was so engaged so as to preclude his heirs from recovering in view of the exception in the by-laws of this petitioning Association.

We respectfully submit that the writer of the majority opinion overlooked the legal distinction as announced and settled by all the courts, including that court previously, between a provision in a policy which exempts liability where a person is "engaged in" a forbidden activity and those cases which construe a provision excluding accidents occurring while the insured is "participating in" a forbidden venture which exposes him to risk of injury.

In arriving at the meaning of the word "participate" as used in the policy in suit this court will endeavor to place

itself in the position of the contracting parties so as to appreciate the risks which the insurer intended to assume and those which it intended to exclude. Dynamite is well known to be an explosive and when it explodes persons in too close proximity are killed or injured. Plainly Prinsen was participating in the movement of dynamite while making delivery at the magazine. If the explosion had occurred there he would have been killed if close enough to the explosion, and his death would have resulted from physical proximity to the dynamite and not from any legal relation to it. When the train exploded the dynamite Prinsen and Begaman were both subject to the same identical hazard. The fact that Begaman was driving the truck did not increase his danger one whit over the danger to which Prinsen was exposed. Both were equally exposed to a risk which the insurer plainly intended to exclude from its coverage.

Placing itself in the position of the parties at the inception of the agreement, will this court permit it to be said that with two members sitting in the seat of a truck loaded with dynamite the clause here found in the association's benefit certificate could be so construed by the courts as not to bind one member because he was not driving and yet cover the other because he happened to be driving?

It is therefore respectfully submitted that this case is one which properly calls for the exercise of this court's supervising powers to grant a writ of certiorari to the end that after reviewing the decision of the Tenth Circuit Court of Appeals in this case and comparing and considering its conflict with other decisions of both federal and state courts involving and construing the same contract provision so frequently found in accident insurance policies and fraternal benefit association certificates, this court may determine and settle the true and correct construction to be placed thereon to be followed in this and future cases.

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IN THE

SUPREME COURT
of the United States

October Term, 1933

THE TRAVELERS PROTECTIVE ASSOCIATION OF AMERICA

Petitioner and Appellee below

vs.

ULUETTA PRINSEN

Respondent and Appellant below

Brief of Respondent

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit

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I.

OPINIONS OF THE COURT AND OF THE CIRCUIT COURT BELOW:

R. 67, 72 and reported in 65 Fed. (2d) 841.

II.

STATEMENT OF CASE

The respondent, Uluetta Prinsen, a resident of Salt Lake City and County, Utah, commenced this action in the Third Judicial District Court of Salt Lake County, State of Utah,

against the petitioner, The Travelers Protective Association of America, a corporation, organized under the laws of the State of Missouri, and duly authorized to do business as a foreign corporation in the State of Utah (R. 1), to recover $5,000.00 with interest, upon a certificate of membership issued under date of October 13, 1915, by petitioner corporation to James Prinsen, now deceased, and in which certificate of membership respondent, the widow of the said James Prinsen, was named as beneficiary. Thereafter, and upon proceedings duly and regularly had therefor the petitioner removed the case from the State Court to the District Court of the United States for the District of Utah (R. 5). Before the latter court a trial was had with a jury which resulted in a verdict being directed against the respondent and in favor of the petitioner (R. 13). From this verdict and the judgment entered thereon, an appeal was taken to the Circuit Court of the Tenth Circuit. That court, in its decision, reversed the lower court (R. 74).

Petitioner is a fraternal beneficial society, operated solely for the mutual benefit of its members and their beneficiaries and not for profit. It has a lodge system and a representative form of government and makes provision for the payment of the benefit claimed should the member, while in good standing and subject to the conditions, provisions and limitations of its constitution, amendments thereto and by-laws, through external, violent and accidental means receive bodily injuries which, within six months following the date of said accident, result in his death (R. 6).

It is alleged by respondent that James Prinsen, the assured and a member in good standing of petitioner corporation, came to his death on the 3rd day of February, 1931, by rea-

son of bodily injuries received that day through external, violent and accidental means at or near Cudahy Lane, Davis County, State of Utah, as a result of collision between a railroad train and an automobile in which the said James Prinsen was riding (R. 1-5).

On the part of petitioner it is alleged that the automobile in which the deceased was riding at the time of the accident was loaded with a large number of dynamite caps and that his death was caused by reason of the fact that he was "participating" in the moving or transportation of dynamite caps, contrary to the articles of incorporation, constitution and by-laws of petitioner corporation which provide that the petitioner corporation shall not be liable in case of injuries, fatal or otherwise, "when a member is participating * * * in the moving or transportation of gun-powder, dynamite or other explosive substance or substances" (R. 8-9).

Petitioner further alleges that the death of the said James Prinsen resulted from a voluntary or unnecessary exposure to danger or obvious risk of injury in violation of the provisions of the articles of incorporation, constitution and by-laws of petitioner corporation which provide there shall be no liability when the death of the member is "the result of voluntary or unnecessary exposure to danger or to obvious risk of injury." It is contended by petitioner that James Prinsen voluntarily and unnecessarily exposed himself to danger and to obvious risk of injury in riding upon the automobile truck loaded with dynamite caps as aforesaid, and in heedlessly, negligently, voluntarily and unnecessarily allowing the truck, loaded with dynamite caps, to be driven onto the railroad track in front of a train rapidly approaching thereon (R. 9).

By way of reply, respondent denies the affirmative allega-

tions of petitioner including those to the effect that the deceased was participating in the moving or transportation of an explosive substance at the time of the injury resulting in his death or that his death resulted therefrom, or that he voluntarily or unnecessarily exposed himself to danger or to obvious risk of injury. Respondent affirmatively alleges that at the time of the accident the deceased was riding upon the automobile as an invitee or guest and had no control in the operation or running thereof (R. 10-12).

Respondent further alleges, by way of reply, that the certificate of membership issued to the deceased was issued by petitioner with the full knowledge, understanding and agreement that deceased was employed as a powder salesman by the Western Powder Company, and engaged in the handling, purchase, sale and distribution of dynamite caps, gun-powder and dynamite.

Practically the entire case was submitted upon stipulations of fact by both parties which show, in the main, that at the time of the accident James Prinsen, the assured, was riding upon the automobile truck driven by a man by the name of Begaman, an employee of the Tintic Powder & Supply Company; that the dynamite caps on the truck had been delivered sometime prior to the accident to the Tintic Powder & Supply Company, through the medium of Begaman, by Mr. Prinsen, an employee of the Western Powder Company, who, after the delivery of the caps, chose to return to Salt Lake City on the truck as a guest or invitee of Begaman (R. 30-33). The record also shows that the application for membership stated that the applicant was engaged in the commission business, selling powder as a salesman (R. 28). Under the circumstances the trial court held, as a matter of law, that

James Prinsen was "participating" in the moving or transportation of an explosive substance, that his death resulted thereby and that, under the circumstances, he voluntarily and unnecessarily subjected himself to danger or to obvious risk or injury. The trial court holding, as a matter of law, that the conduct of the assured came within the excepted risks of the policy of insurance, directed a verdict in favor of petitioner (R. 12-13).

SUMMARY

It is submitted by the respondent herein that the following points will arise in a consideration of this case:

1. It being admitted that the assured met his death solely through external, violent and accidental means, the distinct burden was on the insurer to prove that death resulted from a cause excepted in the policy, and not only must the proof go to the extent that the death was caused by an excepted risk but it must be shown that the excepted act was the proximate cause of the death.

2. The deceased in this case was not participating in the moving or transportation of dynamite caps, within the meaning of the policy, but was a mere guest of the truck driver who was hauling such caps for his employer.

3. When two causes join in causing an injury, one of which is insured against, under an accident policy, the insured is covered by the policy, or at least it is a question for the jury to determine.

4. The assured's death was not the result of voluntary or unnecessary exposure to danger or to obvious risk of injury.

5. Inasmuch as the assured in his application for the policy gave his occupation as powder salesman for the West-

ern Powder Company, which company was engaged in the purchase, sale and distribution of dynamite caps, gun-powder, and dynamite, the company cannot now avail itself of risks which might be incident to the assured's occupation.

ARGUMENT

I.

THE ASSURED WAS NOT, AT THE TIME OF HIS DEATH, "PARTICIPATING" IN THE MOVING OR TRANSPORTATION OF THE DYNAMITE CAPS.

It was stipulated in this case, (R. 37), that the assured, James Prinsen, was not an employee of the purchaser of the dynamite caps nor of the owner of the dynamite caps at the time of the collision with the train resulting in his death. He was at the time of his death riding on a truck in which explosive substances were being moved and transported by others. Can it be said that, under these circumstances, Mr. Prinsen was "participating" in the moving or transportation of explosives?

Great reliance is had by the petitioner on the case of Head vs. New York Life Insurance Company, 43 Fed. (2d) 517, where the court held that one in an airplane is participating in aeronautics by riding therein for the purpose of obtaining information as to the formation of an accident insurance policy. It is readily seen that that case is distinguishable from the case at bar. Everyone who enters an airplane for the purpose of flying is participating in aeronautics, but if he entered an airplane that was under contract with the United States government to carry mail, he would not be participating, necessarily, in the carrying of the United States mail.

By a parity of reasoning, Prinsen, at the time he was killed, was unquestionably participating in riding on a truck or in "automobiling," but that was all. This distinction is rather clearly drawn in the case of Bew vs. Travelers' Insurance Company, 95 N. J. Law 533, 112 Atl. 859. In discussing this question, the court said at page 860:

> "If the question were respecting the scope of the provision that the policy did not apply to anyone 'participating in tobogganing,' would it be asserted that the occupants of the sled who had no part in the steering were not participating in tobogganing? If one *rides in the rear seat* of an automobile, is he not participating in automobiling? If one hires a motorboat and crew to take him for a ride on a river, would it be said that he was not participating in boating? It seems clear that he would be."

But, the mere fact that the driver of a truck, loaded with freight belonging to his employer, allows someone to ride with him, would not make the guest or occupant so riding a participant—have a share in—take part in—the transportation of freight with which the truck was loaded. Suppose, for instance, that Mr. Prinsen had delivered the dynamite caps to the railroad company for shipment to the purchaser at a distant point and then had boarded the next train of that company as a passenger, and suppose further that the company's agents had loaded the caps on the baggage or express car of that train with Mr. Prinsen's knowledge and then assume that Mr. Prinsen's train was derailed or met with some other accident and the caps exploded and Mr. Prinsen had been killed in that manner, could it be said that he was participating in the transportation of the caps so as to defeat the right of recovery on his accident insurance policy? He would

clearly be participating in train riding or railroading or something of that sort, but surely it cannot be seriously contended that he was participating in more than this, any more than he would be participating in any other of the manifold activities in which the railroad and train of cars were engaged, in the moving of that particular train. We believe that no valid distinction can be drawn between this sort of a case and the case at bar.

It has been held:

> "Where, upon completion of a flight in an airplane, the assured stepped onto a wing of the plane, and then, in bending over to avoid a drift wire, was struck by the propeller as he straightened up, although his death was a sequence of participation in an airplane flight, it was not 'in consequence of having participated in aeronautics,' within exemption provision of life and accident policy."
>
> Tierney vs. Occidental Life Insurance Company of California, 89 Cal. App. 779, 265 Pac. 400.

II.

ASSUMING THAT THE ASSURED, AT THE TIME OF HIS DEATH, WAS "PARTICIPATING" IN THE MOVING OF THE DYNAMITE CAPS, STILL IT IS INCUMBENT UPON THE PETITIONER HERE TO PROVE THAT SUCH PARTICIPATION WAS THE PROXIMATE CAUSE OF THE ASSURED'S DEATH, AND IT IS SUBMITTED THE COURT COULD NOT SAY, AS A MATTER OF LAW, THAT IT WAS SUCH A PROXIMATE CAUSE.

It is true that the by-laws of the defendant company

which govern the policy in question provide that the company shall not be liable "*when* a member is participating * * * in the moving or transportation of gunpowder, dynamite or other explosive substance or substances." (R. p. 26). It is also true that the trial court laid much emphasis on the word "when" as used in the foregoing provision of the by-laws and, in effect, held that the assured's alleged participation in the moving or transportation of explosive substances need have no causal connection with his death in order to defeat recovery on the policy. This position appears to us to be untenable.

The contract of insurance must be given a reasonable construction and one which comports with the intent of the parties. The obvious and, to our minds, the only reasonable intent of the parties in agreeing to except this particular risk from the operation of the policy was that the company did not intend to become liable for the death of a person who was killed by reason of an explosion occurring while he was moving explosives from place to place. If he were moving explosives and were accidentally killed from some other and absolutely unrelated cause, it would seem to be an abortion of justice to deny recovery by the beneficiary. Suppose, for instance, in the case at bar, that the dynamite caps had not exploded at all, even after the truck was hit by the train, and that Prinsen's death was admittedly caused by the impact of the collision alone. Apparently the trial court would have taken the view that he could not have recovered, and such a view, we believe, would have been error. Or, to go a step further, suppose that Prinsen had been accidentally struck by a bullet from a gun as he was riding on the truck and his death had resulted. Would it still be reasonable to say that he could not

recover even though the court determined, as a matter of law, that he was participating in the transportation of explosives within the meaning of the terms of his policy? We think not, and we submit that the trial court fell into grave error in not only holding that Prinsen was participating in the moving of explosives, but in deciding, further, that the defendant was not obliged to show any causal connection between his so doing and his death.

The law seems fairly well established that the insurer not only has the burden of proving that the assured was performing an act excepted from the operation of the policy at the time of his death, but of further proving that such act was the proximate cause of the death itself. Thus the general rule is stated in Cooley's Briefs on Insurance, 2nd Edition, Volume 6, page 5296, as follows:

> "To be available to relieve the insurer, the excepted risk must be the direct cause of the death or injury."

In the case of Matthes vs. Imperial Acc. Assn., 110 Iowa 222, 81 N. W. 484, the plaintiff's insurance policy excepted the company from liability if the disability was incurred "while violating the law." It will be noted that the word "while" was used in the policy which is synonymous with the word "when" as used in the policy in the case at bar. The accident for which the assured sought to recover happened on a Sunday while the plaintiff was attempting to get some pidgeons out of the cupola of his barn. The defendant contended that the plaintiff, in attempting to get the pidgeons, was violating the statute which prohibited labor on Sunday and that consequently he could not recover. The court ex-

pressed doubt that the plaintiff was violating the law, but went on to hold that in any event there was no causal connection between the alleged violation and the accident, stating:

> "We may further suggest on this question that the violation of law mentioned in the policy is evidently intended to comprehend acts that will avoid the risk if done at any time. They must be in the nature of contributing causes, and not mere conditions of the accident."

So, also, in the case of Jones vs. U. S. Mutual Accident Association, 92 Iowa 652, 61 N. W. 485, the court construed an accident policy which provided that the insurance should not "extend to or cover accidental injuries or death happening *while* the insured is under the influence of intoxicating drinks, or in consequence thereof; or *while* or in consequence of violating the law." Again, the court will see that the word "while" as well as the phrase "in consequence of" is used. The court said:

> "Defendant asked instructions, which were refused, to the effect that plaintiff could not recover because the evidence showed that Jones received the mortal wound—First, in violation of law, in being in a house of ill fame for an immoral purpose, and carrying concealed weapons; second, while fighting and quarreling; third, by voluntary exposure to unnecessary danger. It may be conceded that Jones visited the house of prostitution for an unlawful purpose; that he was carrying concealed weapons, in violation of law; but it does not appear that the injury he received was caused by any of these illegal acts. It is not enough to defeat liability to show that the assured violated the conditions of the policy in these respects, but it must also be shown that such violation had a causative connection with the injury. The shooting was not, in a legal sense, caused by or the result of

> the assured's visit to the bawdyhouse,—reprehensible as that act may have been,—nor of his carrying concealed weapons in violation of law. In other words, it does not appear that there was any such connection between the unlawful acts and the injury as would justify the contention that the former caused the latter. If the injury was caused or produced by something else than the assured's violation of the law, then the latter cannot be said to have such a legal relation to the former as to be a defense to the action upon the policy."

The case of Accident Insurance Company of North America vs. Bennett, 90 Tenn. 256, 16 S. W. 723, is also in point, one of the syllabi of that case reading as follows:

> "Under a policy stipulating that the insurance does not extend to injuries received while engaged in, or in consequence of, any unlawful act, the fact that the assured was killed while living in a state of fornication with his mistress does not prevent a recovery, where it does not appear that the infliction of injury is a natural and necessary consequence of the unlawful association, as its probable and to be anticipated result."

The court thereupon emphasized this theory at page 725 of its opinion as follows:

> "But again, passing this question, if it were true that such association *per se* was an unlawful act, it would not follow that plaintiff could not recover. In order to defeat a recovery because of such provision, there must appear a connecting link between the unlawful act and the death. It is not sufficient that there was an unlawful act committed by the insured, and that death occurred during the time he was engaged in its commission. There must be some causative connection between the act which constituted a violation of the law and the death of the insured. Bloom vs. In-

> surance Co., 97 Ind. 478. Illustrating, it is aptly said in the same case: 'Suppose a man violates the law against profanity, and is shot while so doing, should that absolve the company from liability?' And see, to the same effect, Bradly vs. Insurance Co., 45 N. Y. 432; Cluff vs. Insurance Co., 13 Allen 308. Numerous illustrations of similar character might be presented in which the act, however unlawful, has no relation to the death as its cause or contributory element; but they need not be multiplied. There is no pretense that the death was caused directly by any such unlawful act of deceased, or resulted as a natural consequence thereof."

A somewhat similar situation arose in the case of Wilkinson vs. Travellers' Insurance Co. (Tex. Civ. App.) 72 S. W. 1016, one of the syllabi thereof reading as follows:

> "A stipulation in an accident policy, exempting the insurer from liability for injuries received by the insured while hunting, does not relieve the insurer from liability for injuries sustained by the insured while helping to bring in a log to make a fire while on a hunting expedition."

In the quite late case of Whyte vs. Union Mutual Casualty Company, 209 Iowa 917, 227 N. W. 518, the court reaffirmed this doctrine. It is stated in one of the syllabi:

> "Under accident insurance policy excepting loss resulting from any act of insured while engaged in or in consequence of any violation of law, beneficiary *held* not entitled to recover if violations of law were proximate cause of accident rather than sole cause."

An analogous situation arose in the case of Wright vs. Aetna Life Insurance Company, (C. C. A. 3rd), 10 Federal

(2nd) 281, where the court construed the words "while riding in" an automobile as used in an accident insurance policy to, in effect, mean *as a result* of riding in an automobile. The third syllabus reads as follows:

> "An additional policy, in form of automobile rider, covering injuries received "while riding in" automobile, *held* to cover accidents which might reasonably be expected to happen to one riding in a car, and to cover injury received when assured jumped or was thrown from car after driver lost control."

It would seem reasonably clear, both on principle and from an examination of the authorities, that the phrase "when participating" as used in the policy in the case at bar must be construed to mean *as a result of* participating. This is the only construction that preserves what must have been the intent of the contracting parties, and the only construction that is fair to the assured, and at the risk of reiteration, we again suggest that the court will construe such clauses favorably to the assured.

If we are correct in the foregoing premise, the only remaining question is whether the trial court could say, as a matter of law, that the explosion of the dynamite caps was a proximate cause of the assured's death, keeping in mind that the burden was on the defendant to prove this, and keeping further, in mind the rule that if reasonable men could draw different inferences in this respect from the facts as they appear in the record, it was the duty of the court to submit the question to the jury.

The facts are largely undisputed. Unquestionably a jury could reasonably find that a heavy train, moving in excess

of twenty-five miles an hour, (R. p. 37) and striking the truck in which the assured was riding, was sufficient of itself to *instantly* cause the assured's death. Indeed, there is no evidence whatsoever in the record that the death of the assured was caused or hastened by the explosion of the dynamite caps. Certainly, the impact of the collision was sufficient to cause death, and certainly, also, it was first in point of time. It would seem, therefore, that every presumption should favor the view that a cause, sufficient of itself to produce a result and occurring first in point of time, did, in fact, cause the result, especially when the burden was on the insurer to prove otherwise and which it failed to do. The very most that might be said for the insurer in this connection would be that the jury might reasonably find that the assured's death was contributed to or hastened by the explosion of the caps. Viewing the matter, therefore, in the light most favorable to the insurer, it would seem that the court should have submitted the question of causation to the jury.

We respectfully submit that this situation is similar to the case of Travellers' Insurance Company vs. Melick. (C. C. A. 8th) 65 Federal 178, heretofore decided. That case involved an action on an accident insurance policy wherein one of the excepted risks was "suicide," precisely as one of the excepted risks in the case at bar is "participating" in the transportation or moving of explosive substances. The assured suffered an accidental gun shot wound which produced an agonizing tetanus. After suffering the agonies of this disease, the assured was found dead in his bed with his throat cut and a scalpel in his right hand. There was evidence that the tetanus might have caused his death, and also that the scalpel wound was sufficient to have caused it.

On this state of the record, the insurance company moved for a directed verdict which the trial court refused to grant. The court submitted to the jury the question whether the tetanus or the throat wound in fact caused the assured's death.

The Circuit Court of Appeals, speaking through Judge Sanborn, affirmed a judgment for the assured, and held, distinctly, two things: first, that the excepted risk of the suicide had to be a proximate cause of the assured's death in order to defeat recovery on the policy; and secondly, that the court could not say, as a matter of law, that the assured's slashing his own throat in such a way as to cut his trachea and jugular veins was even a contributing cause to his death, but that the question was one for the jury. The case is, of course, much stronger against the insurer than the case at bar because there the assured was obviously alive at the instant he buried the scalpel in his throat, whereas, in this case, there is not a scintilla of proof that the assured was alive either at the instant of the explosion or at the moment the force of the explosion reached his body. So far as the record here is concerned, the explosion may not even have occurred at the moment of the impact, as it clearly appears (R. p. 41) that the engine pushed the truck some considerable number of feet down the track before coming to a stop. The explosion may not have occurred until some of the dynamite caps hit the ground, who knows? And Prinsen may have died several seconds prior to this. Even if the explosion occurred instantly upon impact, if the force of the impact itself was sufficient to cause Prinsen's almost instantaneous death, the explosion could not be considered even as a contributing cause thereto.

The entire opinion of the court in the Melick case, supra,

so ably written by Judge Sanborn, is decidedly pertinent to the issues involved in the case at bar. We have stated above what we believe to be a fair summary of the holding of the court, but to give more emphasis to our position we quote the following meagre portions of the opinion, to-wit:

> "The first question in this case is whether or not the court below should have instructed the jury to return a verdict in favor of the plaintiff in error. The Travelers' Insurance Company of Hartford, Conn., the plaintiff in error, insured, by its written policy, Dr. Leonard H. Robbins, a physician of Lincoln, Neb., for a term of one year, against death that should result from 'bodily injuries effected during the term of this insurance, through external, violent, and accidental means alone, * * * independently of all other causes.' The policy provided that:
>
> "'This insurance does not cover disappearances; nor suicide, sane or insane; * * * nor accident, nor death, * * * resulting wholly or partly from * * * disease or bodily infirmity, hernia, fits, vertigo, sleep-walking, * * * intentional injuries (inflicted by the insured or any other person).'"
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> * * * * *
>
> "Under this state of the evidence, it is assigned as error that the court below refused to instruct the jury to return a verdict for the insurance company; and it is contended that the question whether the shot wound which caused the tetanus, or the throat cutting, was the proximate cause of the death, was a question of law for the court.
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> "In Railway Co. vs. Kellogg, 94 U. S. 469, 474, 476, Mr. Justice Strong, who delivered the opinion of the court, said:
>
> "'The true rule is that what is the proximate cause of an injury is ordinarily a question for the

jury. It is not a question of science or of legal knowledge. * * * In the nature of things, there is in every transaction a succession of events, more or less dependent upon those preceding; and it is the province of a jury to look at this succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dissevered by new and independent agencies, and this must be determined in view of the circumstances existing at the time.'

"This opinion of the supreme court is a complete answer to the contention of the plaintiff in error here, * * *.

"It is urged that this question was for the court, and that the court was bound to declare that the cutting was the proximate efficient cause of the death in this case, because the evidence was uncontradicted that the cutting was later in time than the shot wound, and was sufficient to cause the death. This position might be maintained if the cutting was not itself produced by the shot wound, and if the evidence was uncontradicted that the death would not have occurred as soon from the tetanus in the absence of the cutting. But the argument begs the primary question in the case,—whether the cutting was a cause of the death at all. If it neither caused nor hastened the death of the insured then it was in no sense a cause of it; and, however new or sufficient it may have been to have caused it, it could not relieve the insurance company from a death whose sole cause was the accidental injury. This question was peculiarly one of fact. The insurance company had agreed to pay the promised indemnity for any death that resulted from the accidental shot wound alone. The question was, what did in fact cause the death,—the shot wound, the cutting, or both? *Nor would this case be withdrawn from the effect of this rule if the evidence upon this question was undisputed, for the question is always for the jury where a given state of facts is such that reasonable men may fairly differ upon it.* It is only when

all reasonable men, fairly exercising their judgments, must draw the same conclusion from an admitted state of facts, that it becomes the duty of the court to withdraw a question of fact from the jury."

* * * * *

"It must be borne in mind that the doctrine of proximate cause has a different relation to an action for negligence from that which it bears to a contract to indemnify for the result of a given cause. In the former it measures the liability, while in the latter the contract fixes the extent of the liability. In an action for negligence the liability extends only to the natural and probable consequences of the negligent act. In the case in hand the contract is to indemnify the insured against death that shall result within 90 days from accidental bodily injuries alone. The company was undoubtedly liable under this contract for the death of the insured if that death did in fact result from the accidental shot wound alone."

The Circuit Court of Appeals, in the case of Mutual Life Ins. Company vs. Hatten, (C. C. A. 8th), 17 Federal (2d) 889, speaking through Judge Kenyon, and in citing the Melick case, supra, held under circumstances very much in point to the case at bar, that the question of causation should have been submitted to the jury. The court stating in part as follows:

"No one saw the accident. It will ever remain a mystery, and there must be more or less surmise as to how it happened. * * * The rule as to direction of verdicts is well established in the federal courts. Where the evidence on a fact matter is of such character that reasonable men, in an impartial and fair exercise of their judgment, may honestly reach different conclusions, the question is for the jury."

We submit, therefore, that even should this court deter-

mine that, as a matter of law, the assured, at the time of his death, was "participating" in the moving of explosive substances, that it should also conclude that the question of his "participation" as being the proximate cause of his death should have been submitted to the jury under proper instructions.

III.

THEN THE NEXT QUESTION IS WHAT WAS THE PROXIMATE CAUSE OF MR. PRINSEN'S DEATH IN THIS CASE?

This question has frequently been before the courts. In the case of Aetna Insurance Company vs. Boon, 95 U. S. 117, 24 L. Ed. 395, the question was given a full and thorough consideration. That was a case where a federal commander of the U. S. army burned certain property in Glasgow, Missouri, to prevent the use of the provisions therein contained by Confederate soldiers who were about to take the town. The policy was one covering fire insurance but containing an exemption as to loss resulting from invasion and insurrection of the place, and the court there held that the loss was within the exception; that the burning of the town by the military commander was a mere incident or remote cause, as distinguished from the proximate cause. In the course of the opinion, the court said:

> "The proximate cause is the efficient cause—the cause that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior controlling agency are not the proximate causes and the responsible ones though they may be nearer in time to the result."

95 U. S. 130, 24 L. Ed. 398.

In the course of the opinion, the court approved the following language from Brady vs. Insurance Company, 11 Mich. 425:

> "That which is the actual cause of the loss, whether operating directly or by putting intervening agencies, the operation of which could not be reasonably avoided, in motion, by which the loss is produced, is the cause to which such loss should be attributed."
> 95 U. S. 131, 24 L. Ed. 399.

There are many other illustrations of the application of the rule under discussion cited in the opinion by the court in that case.

This court had the question before it in the Louisiana Insurance Company vs. Tweed, 7 Wal. 44, 19 L. Ed. 65, as to what was the proximate cause of the loss. The policy covered destruction by fire and a fire arose from an explosion. Explosions were within the exception of the policy and it was there held:

> "Where an explosion produced or set in operation the fire which burned the plaintiff's cotton, the fact that it was carried to the cotton by first burning another building will not so take the case out of the exception in the policy that the insurers will not be liable by means of an explosion nor can the accidental circumstance that the wind was blowing in the direction to favor the progress of the fire toward the warehouse be considered as a new cause."

See also, The G. R. Booth, 171 U. S. 450, 19 S. Ct. 9, 43 L. Ed. 234.

In reviewing the matter of proximate cause in an action

where it was sought to hold a railroad company for the destruction of goods where a baggage car was burned up, after it had been blown over, the Supreme Court of Colorado made these observations:

> "In Insurance Company vs. Tweed, 7 Wall. 52, the late lamented Mr. Justice Miller said: 'We have had cited to us a general review of the doctrine of proximate and remote causes, as it has arisen and been decided in the courts in a great variety of cases. It would be an unprofitable labor to enter into an examination of these cases. If we could deduce from them the best possible expression of the rule, it would remain after all to decide each case largely upon the special facts belonging to it, and often upon the very nicest discriminations.' In Howard Fire Insurance Co. vs. Norwich & N. Y. Transp. Co., 12 Wall. 199, in delivering the opinion of the court, Mr. Justice Strong said: 'And certainly, that cause which set the other in motion, and gave to it its efficiency to do harm at the time of the disaster, must rank as predominant.' In Railroad Co. vs. Kellogg, 94 U. S. 475, it is said: 'The inquiry must therefore always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury.' In Insurance Company vs. Boon, 95 U. S. 130, it is said: 'The proximate cause is the efficient cause; the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster.' "
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> Blythe vs. Denver & R. G. Ry. Co., 15 Colo. 333, 25 Pac. 702, 22 A. S. R. 403, 11 L. R. A. 618.

In that case it was held that a wind storm blew the baggage

car over, up-setting a kerosene stove, consuming the car by fire, was traceable to an act of God, i. e., the wind storm, and the carrier therefore was not liable.

It is generally held that the destruction of a building by an explosion, caused by a fire, is a loss by fire within the meaning of a provision in the policy of insurance providing that the company shall not be liable for any loss or damage caused by explosion of any kind, unless fire insues and then for the loss by fire only.

Washburn vs. Farmers' Insurance Co., 2 Fed. 304.

See also,

Washburn vs. The Miami Valley Insurance Company, 2 Fed. 633.

See also, other cases dealing with proximate cause:

Phoenix Insurance Co. vs. Charleston Bridge company, 65 Fed. (C.C.A. 4th) 628;

Park Saddle Horse Company vs. Royal Indemnity Co., 81 Mont. 99, 261 Pac. 880;

Wright vs. Aetna Life Insurance Company, 17 Fed. (2d) 596.

A provision in a policy reading:

"Upon the 21 steam boilers and 34 filters, tanks, converters, etc., on the premises occupied by the assured as Sugar Refinery, situate in the City of Chicago, State of Illinois, and upon the steam pipes, the 9 engines, the shafting, belting, hangers, pulleys and the two elevators connected therewith and operated thereby, against explosion and accident, and against loss or damage resulting therefrom, to the property,

real and personal, of the assured and to all property of other persons for which the assured may be liable."

But containing this exception:

"And no claim shall be made under this policy for any explosion or loss caused by the burning of the building or steamer containing the boiler or boilers, engines, elevators, or machinery, or for any loss or damage by fire resulting from any cause whatever."

The second syllabus of this case is as follows:

"A small fire broke out in the insured building, and continued for three days, though apparently extinguished each day. On the third day efforts to put out the fire resulted in bringing it in contact with a cloud of starch dust, which ignited and exploded, demolishing the building, which then burned up. Held that the insurance company was not liable, since the explosion was merely an incident of the fire."

American Steam Boiler Ins. Co. vs. Chicago Sugar Refining Co., 57 Fed. 294.

In a case where the plaintiff owned a three-story building, 39 feet high and was insured against loss and damages by fire. Fire consumed the anterior of an adjacent five-story brick building, leaving an unsupported brick wall standing 69 feet high and 175 feet long. Several days thereafter, a strong wind arose, during which time the wall fell upon the plaintiff's building causing the damages sought to be recovered for. It was held that the proximate cause in this case was damages by fire.

Russell vs. German Fire Insurance Company, 100 Minn. 528, 111 N. W. 400;

10 L. R. A. N. S. 326.

In the course of the opinion the court said:

> "This brings us to the main question in the case: What was the proximate cause of the damage? * * * Whatever may have been the original meaning of the maxim, CAUSA PROXIMA ET NON REMOTA SPECTATUR, it has been clearly settled by a long line of decisions that what is meant by proximate cause is not that which is last in time or place, not merely that which was in activity at the consummation of the injury, but that which is the procuring, efficient, and predominant cause. Thus, in our own state, in Ransier vs. Minneapolis & St. L. R. Co., 32 Minn. 331, 20 N. W. 332, in applying the maxim, it was held that in a negligence case the wrongdoer was responsible for all the injuries which resulted as the natural consequence of his misconduct,—such consequences as might have been reasonably anticipated as likely to occur; and that, whether an injury in a particular case was the natural, proximate result of the wrong complained of is ordinarily a question of fact for the determination of the jury. In Christianson vs. Chicago, St. P. M. & O. R. Co., 67 Minn. 94, 69 N. W. 640, it was said: 'Consequences which follow in unbroken sequence, without an intervening efficient cause, from the original negligent act, are natural and proximate.' Again in Strobeck vs. Bren, 93 Minn. 428, 101 N. W. 795, the following definition of proximate cause was adopted: 'The proximate cause of an injury, within the meaning of the law of negligence, is such cause as operates to produce particular consequences without the intervention of any independent or unforeseen cause or event, without which the injury could not have occurred,—such consequences as might reasonably have been anticipated as likely to occur from the alleged negligent act.' Proximate cause has also been defined as being that from which the effect might reasonably be expected to follow, without the concurrence of any unfore-

seen circumstances. The rule is stated in Marble vs. Worcester, 4 Gray 412: "Having discovered an efficient, adequate cause, that is to be deemed the true cause, unless some new cause, not incidental to, but independent of, the first, shall be found to intervene between it and the result.' In Brady vs. North Western Ins. Co., 11 Mich. 425, the rule is discussed as follows: 'Much is said by judges of the proximate and remote cause of the loss; and the distinction was very elaborately discussed by counsel in the present case. But, after careful consideration, I must confess that, to my mind, the word 'proximate' is unfortunately used, and serves often to mislead the inquirer, and to produce misapprehension of the real rule of law. That which is the actual cause of the loss, whether operating directly, or by putting intervening agencies, the operation of which could not be reasonably avoided, in motion, by which the loss is produced, is the cause to which such loss should be attributed.' In speaking of the rule as applied to insurance cases, it is said (Vol. 3, Sec. 2832, Joyce on Insurance): 'It may be generally stated that the loss in insurance cases must be proximately caused by a peril insured against, and that the contract does not contemplate an indemnity to the assured where the peril is the remote cause of loss.' In discussing the liability to misapply the maxim, Mr. Phillips, (Phillips, Ins. Sec. 1132) observes: 'In case of the concurrence of different causes, to one of which it is necessary to attribute the loss, it is to be attributed to the efficient predominating peril, whether it is or is not in activity at the consummation of the disaster.' Again: 'In every insurance, the risk on each peril is liable to be affected by every other peril; and the party, whether insurer or assured, at whose risk a peril is, must bear the loss by such peril, though it may have been indirectly and incidentally enhanced by another, for which he is not answerable, where there is no express or implied stipulation, obligation, or condition against the subject being exposed to such other peril; but, where the loss is by a risk to which the subject is exposed in violation of the express or implied stipulations of the

parties, the underwriter is not liable for it.' Sec. 1134.

"In this connection, it should be noted that it is not necessary, under policies of this character, that the damage should be occasioned by direct contact with the fire. To render the fire the immediate or proximate cause of the loss or damage, it is not necessary that any part of the insured property actually ignited or was consumed by fire. Ermentrout vs. Girard F. & M. Ins. Co., 63 Minn. 305, 30 L. R. A. 346, 56 Am. St. Rep. 481, 65 N. W. 635, where it was held that the fall of the insured building was within the policy, although no part of it ignited or was consumed by fire. See also New York & B. Despatch Exp. Co. vs. Traders' & M. Ins. Co., 132 Mass. 377, 42 Am. Rep. 440.

"A few leading cases will be sufficient to illustrate the maxim. In Lynn Gas & Electric Co. vs. Meriden F. Ins. Co., 158 Mass. 570, 20 L. R. A. 297, 35 Am. St. Rep. 540, 33 N. E. 690, a building and machinery used for generating electricity for electric lighting were insured against loss or damage by fire. A fire occurred which caused a 'short circuit' of the electric current, resulting in damage to certain machinery in the building not reached by the fire. It was held that the injury to the machinery caused in this way was a 'loss or damage by fire,' within the meaning of the policy. The court said: 'They must be presumed to have contemplated such effects as fire might naturally produce in connection with the machinery used in generating and transmitting strong currents of electricity.' Our attention has been called to a case from the civil court of Manchester, England (Gaskarth vs. Law Union F. Ins. Co., 6 Ins. L. J. 159), where it was held that the insurance company was liable for damages caused by the falling of the wall during a violent gale some time after the fire; but the facts are not fully stated and the principles are not discussed."

After distinguishing from other decisions, the court further observed:

"More nearly in point are the following: in Aetna F. Insurance Co. vs. Boon, 95 U. S. 130, 24 L. Ed. 398, the policy of insurance was upon certain goods then in storage in the city of Glasgow, Missouri, and contained the following stipulation: 'Provided always, and it is hereby declared, that the company shall not be liable to make good any loss or damage by fire which may happen or take place by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power.' October 15, 1864, an armed force of rebels, under military organization, surrounded and attacked the city. The Union forces defended, and battle continued for many hours, and, when it became apparent to the Union commander that the city could not be successfully defended, in order to prevent the military stores from falling into the hands of the enemy, he set fire to the city hall, which was consumed with its contents. The fire spread to the building next adjoining, and from that, through two other buildings, to the store containing the insured goods, which were destroyed. The court held that the fire which destroyed the goods was within the exception of the policy, and that there was no liability; that the attack of the enemy was the proximate cause of the loss; that the fire which caused the destruction of plaintiff's property happened or took place not merely in consequence of, but by means of, the rebel invasion and military or usurped power. The fire occurred while the attack was in progress, and when it was about being successful; that the attack, as a cause, never ceased to operate until the loss was complete, and it was the causa causans which set in operation every agency that contributed to the destruction. The inquiry must always be whether there was any intermediate cause disconnected with the primary fault, and self-supporting, which produced the injury. The burning of the city hall and the spread of the fire afterwards was not a new and independent cause of loss. On the contrary, it was an incident, a necessary incident and consequence, of the hostile rebel attack on the town. A case almost directly in point is that of Johnston vs. West of Scotland

Ins. Co., 7 Shaw & D. 52, where a house covered by a policy of insurance from damage by fire had been injured by the falling of a gable of another house in consequence of fire in that house, and it was held that the company was liable, although the house insured had not been on fire, and the gable of the other house had stood two days after the fire was extinguished, and fell in the course of taking the house down. Howard F. Ins. Co. vs. Norwich & N. Y. Transp. Co., 12 Wall. 194, 20 L. Ed. 378, and New York & B. Despatch Exp. Co. vs. Traders' & M. Ins. Co., supra, illustrate the rule applicable where an efficient cause nearest the loss is expressly insured against. In such cases the insurer is not to be relieved from responsibility by showing that the property was brought within that peril by a cause not mentioned in the contract.

"Applying these principles, it is evident that the contract must be considered from the standpoint of the parties at the time of its execution, in the light of the surrounding circumstances. The risk as defined by the policy covered whatever causes produced the result. The inquiry resolves itself to determining whether or not the wind was an incident in the chain of events or the primary cause."

For another case where the wall of a burned building fell and recovery was allowed, see:

Western Assurance Co. vs. Hann, 29 Ala. 376, 78 So. 232.

Adverting for a moment to the facts here and application of the legal principles stated in the foregoing portion of this brief, we direct the court's attention to the fact that under these, no doubt, sound rules of law, the proximate cause of Mr. Prinsen's death was the collision between the truck and

the train and not the transportation of the dynamite caps at all. If the train had not collided with the truck, from what it appears here, the occupants of that truck could have continued to this good day on their journey, hauling the dynamite caps therein.

We do not concede that Mr. Prinsen's death resulted from the explosion of the dynamite caps, but for the sake of argument, if it be conceded that the train collided with the truck, caused the explosion, and the explosion produced the death of Mr. Prinsen, then it is respectfully submitted that the collision between the train and the truck was the proximate cause—was the cause that set in movement the force that exploded the caps that ultimately extinguished the life of Mr. Prinsen. The case is analogous to the one here cited where fire burns a building and leaves a wall standing and the wall falls on another building and where it was held that the loss thus occasioned was within the terms of a fire insurance policy and the proximate cause was the fire, the fire setting in movement the force that destroyed the building; analogous also to the case where an explosion causes a fire and the fire destroys the building is held to be without the terms of a policy of insurance against fire; analogous also to the case where rebel forces were about to invade Glasgow, Missouri, and the federal commander burns up the supplies and the fire spreads, the proximate cause is the invasion. So, here the proximate cause was not the transportation of dynamite caps which was a mere incident—a remote cause at most. Suppose the collision had occurred as it did, killed Mr. Prinsen, and the dynamite caps had not exploded. Would the petitioner here maintain that it was not liable on the policy involved in this

action. The mere fact that the explosion occurred as an incident of the collision cannot change the situation.

In concluding this branch of the case, we submit that the Circuit Court of Appeals was correct in reversing the lower court and holding that the lower court was in error in directing a verdict in favor of the petitioner here, the defendant below, and that under this record, clearly the question was for the jury to pass upon as different inferences could be drawn from the stipulated facts. We contend, however, that under the rules of law as well recognized and controlling and governing insurance cases, that the lower court ought to have directed a verdict in favor of this respondent, the plaintiff below.

IV.

WHERE TWO CAUSES JOIN IN CAUSING AN INJURY, ONE OF WHICH IS INSURED AGAINST UNDER AN ACCIDENT POLICY AND THE OTHER NOT, THE ASSURED IS COVERED BY THE POLICY.

It appeared in a case that the assured in the daytime and immediately before receiving physical injuries which caused his death, was operating a motorcycle at a speed of twenty-five miles per hour in an easterly direction along a street, which street crossed over an electric railroad. There were cross-arm warnings at the crossing. In approaching the crossing, however, the view to the north was obstructed to a point about thirty feet east of the tracks. The motorcycle was about that distance from the track when the train from the north reached and was moving across the intersection. The motorcycle collided with the side of the cars of the train, causing the injuries from which the assured died.

The clause of the policy under which the plaintiff sought to recover insured against death or disability sustained by the insured "by being struck or knocked down or run over while in or on a public highway by * * * any vehicle * * * propelled by * * * electricity (excluding injuries sustained while on a railroad right of way in violation of statute or any regulation of the railroad company." The plaintiff had judgment below. The court in disposing of the question arising under this brief statement of facts, observed in the course of the opinion:

> "According to the stipulation, the impact was sufficient to break through one of the doors which opened in the side of the car. From this it is contended that the assured was not struck by the car, but that his injuries were wholly due to the velocity of the motorcycle when the collision occurred.
>
> "It has been held that, when two causes join in causing an injury, one of which is insured against, the insured is covered by the policy. (Continental Life Ins. Co. vs. Wilson, 36 Ga. App. 540, 137 S. E. 403; Wright vs. Aetna, etc., Ins. Co., (C.C.A.), 10 Fed. 281, 46 A. L. R. 225); and while from the nature of the accident and other circumstances shown different conclusions might be drawn, the inference which appears to have been drawn by the trial court that the insured was struck by the car is not unreasonable, and is supported by the evidence."
>
> Zimmerman vs. Continental Life Ins. Co., 99 Cal. App. 723, 279 Pac. 464.

Again, it has been held where more than one cause contributed to an injury, or if there is doubt, or facts are such that equally prudent persons might draw different conclusions as to which of the contributing causes is the efficient,

dominent, proximate cause, it is a question for the jury in an action on an accident policy.

Chicago & Eastern Illinois Ry. Co. vs. Whipking, (Ind. App.), 170 N. E. 548.

V.

THE ASSURED'S DEATH WAS NOT THE RESULT OF VOLUNTARY OR UNNECESSARY EXPOSURE TO DANGER OR TO OBVIOUS RISK OF INJURY.

In dealing with this matter, it is well to remember that the burden was on the insurer to prove that the insured voluntarily or unnecessarily exposed himself to danger or obvious risk of injury and that this was a cause of his death. In endeavoring to sustain this burden, the only thing which the insurer proved, or in the nature of things could prove, was that the insured was riding in the truck when the driver drove it in front of the approaching train. There is not the slightest evidence that the insured knew that they were approaching a railroad crossing or that he saw the train at all. The only evidence on the matter at all is the testimony of the fireman (R. p. 40) that he "saw two men in the truck, sitting in the covered cab side by side, and he further saw that the truck was loaded with boxes." On this state of the record, and with the burden of proof on the insurer, it is difficult for us to understand how the court could say, as a matter of law, the assured was voluntarily and unnecessarily exposing himself to danger or obvious risk of injury, and that this was a cause of his death.

Counsel for petitioner, in the argument on the motion for a directed verdict, relied almost entirely on two cases in sup-

port of this ground of their motion; that of The Baltimore & Ohio Railroad Company vs. Goodman, 275 U. S. 66, 45 Sup. Ct. Rep. 24; 72 Law Ed. 167, and that of Parramore vs. Denver & R. G. W. R. Co., (C. C. A. 8th), 5 Federal (2d) 912. With these cases, of course, the court is familiar. In the Goodman case, Mr. Justice Holmes appears to hold that where the driver of a truck or automobile goes upon a railroad crossing, he is, as a matter of law, guilty of negligence unless he stops, looks and listens. Under the peculiar facts of the Parramore case, the Circuit Court of Appeals has held that an invitee or guest riding in a truck or automobile is also under a high duty of care to protect himself if the operator drives the vehicle on a railroad track. Thus the petitioner's counsel argue that in view of these two cases, Prinsen was, as a matter of law, guilty of contributory negligence at the time of his death.

Now, although we concede the force of the Goodman and Parramore cases, we suggest that the doctrine therein announced border on the extreme and should not be further extended. Even granting, for the purpose of argument, that Prinsen's conduct as a matter of law amounted to negligence, we earnestly submit that negligence is wholly different from a "voluntary or unnecessary exposure to danger or to obvious risk of injury" and has been constantly so held by practically all of the authorities. If the insurer wished to avoid its liability in cases when the assured's *negligence* brought about his own death, it should have said so in the policy which it issued. This it did not do. It avoided the use of the word *negligence* entirely and used the rather complicated and ambiguous phrase heretofore referred to. Having deliberately chosen to use that phrase, it will be strictly construed against

the insurer and for this reason, the authorities universally hold that the phrase does not include negligence, and furthermore that it is nearly always a question for the jury whether the assured, in cases like the one before us, brought about his own death as a result of "voluntary or unnecessary exposure to danger or to obvious risk of injury."

The first case to which we wish to direct the court's attention is that of Travellers' Insurance Company of Hartford vs. Randolph, (C. C. A. 6th), 78 Federal 754. The court had for consideration an accident insurance policy which avoided the company's liability where the insured's death was caused by "voluntary exposure to unnecessary danger." The assured, just prior to his death, was standing upon the steps of the platform of a railroad car with his hands in his pockets while the train was running at a speed of about twenty-five miles an hour. He either fell or jumped off and was killed. The defendant insurer requested from the trial court a peremptory instruction that the assured's conduct amounted to "voluntary exposure to unnecessary danger." The question was left to the jury which returned a verdict in favor of the plaintiff. The judgment entered upon this verdict was affirmed by the Circuit Court of Appeals of the Sixth Circuit in a brilliant opinion written by Mr. Justice Harlan.

The insurer in the Randolph case depended very largely on a line of cases which held that a person standing on the steps of the platform of a moving train under circumstances similar to those which the plaintiff found himself was, as a matter of law, guilty of negligence and from this principle sought to argue that such a person was therefore, as a matter of law, guilty of "voluntary exposure to unnecessary dan-

ger." This situation is precisely parallel to the one we find in the case at bar, where the insurer relies on the doctrine of the Parramore case which, of course, has only to do with negligence. The Circuit Court of Appeals, however, disposed of this question by laying down the broad principle that cases having to do only with negligence have no weight in determining the meaning of the phrase "'voluntary exposure to unnecessary danger,'" as used in a *contract* of insurance. Elaborating upon this principle, the court, on pages 766-767 of its opinion, said:

> "Our attention has been called to numerous adjudged cases in which the court has instructed the jury, as matter of law, that certain acts upon the part of a passenger on a railroad car constituted such contributory negligence as precluded a right of recovery against the railroad company. The principles announced in those cases are not, in our opinion, applicable to a *contract* of life insurance that does not in terms exempt the insurer from liability where the death of the insured is caused by his negligence or want of due care. If an accident insurance company wishes to make it a condition of its liability that the assured shall not be guilty of negligence contributing to his injury or death, it should take care that the contract with the assured expressly so provides. The contract in suit covers the injury or death of the assured from all external, violent, and accidental means, except in the cases specifically declared in the contract not to be covered by its provisions. Bodily injury or death resulting from the carelessness of the assured is not excepted from the contract."

In dealing with the phrase "voluntary exposure to unnecessary danger," Mr. Justice Harlan in the Randolph case had to say:

> "The words 'voluntary exposure to unnecessary

danger,' literally interpreted, would embrace every exposure of the assured not actually required by the circumstances of his situation, or enforced by the superior will of others, as well as every danger attending such exposure that might have been avoided by the exercise of care and diligence upon his part. But the same words may be fairly interpreted as referring only to dangers of a real, substantial character, which the insured recognized, but to which he nevertheless purposely and consciously exposed himself, intending at the time to assume all the risks of the situation. The latter interpretation is most favorable to the assured, does no violence to the words used, is consistent with the object of accident insurance contracts, and is therefore the interpretation which the court should adopt. One of the accepted meanings of the word 'voluntary' is 'done by design or intention; purposed; intended.' Webst. Dict."

* * * * *

"Looking at the whole contract, the words 'voluntary exposure to unnecessary danger' are to be held as importing an exposure by the assured to unnecessary danger, with the intention or design at the time to risk the consequences of such exposure."

And in holding that the question was one for the jury the court said:

"Whether, in the present case, the exposure was unnecessary, and whether the assured was aware of and appreciated the danger, and intentionally or purposely risked it, were questions of fact that were properly left for the determination of the jury under appropriate instructions by the court as to the law of the case. In making such determination, the jury were entitled to look at all the evidence, and, as a recognition of the danger and the intention of the assured to take the risk attending the situation may not unreasonably have been inferred from the circumstances and from his acts, the jury were entitled to

> infer a voluntary exposure to unnecessary danger from any facts showing that he could not have failed to recognize the existence of the danger, and must have purposely or intentionally risked it."

The definition of the phrase "voluntary exposure to unnecessary danger," as given by the Circuit Court of Appeals in the Randolph case, is reasonable, fair and logical and, we believe, is supported by the great weight of authority including the following: Ashenfelter vs. Employers Liability Assurance Corp., (C. C. A. 9th) 87 Fed. 682; Thomas vs. Mason's Fraternal Accident Assoc., 71 N. Y. S. 692; Whalen vs. Peerless Casualty Co., 75 N. H. 297, 73 Atl. 642; National Life Ins. Co. vs. Logan, 166 Ala. 174, 52 S. 45; Empire Mutual Life Ins. Co. vs. Allen, 141 Ga. 413, 81 S. E. 120.

The foregoing reasoning and holding appears to us to be eminently sound and we believe there is no divergence from it in any of the authorities. If this is so, both the Goodman and the Parramore case are effectively eliminated from this discussion.

It may be objected that the phraseology of the excepted risk in the Randolph case is slightly different from the phraseology of the excepted risk in the case at bar. We think, however, that they mean substantially the same thing, as a companion case to the Randolph case indicates, namely: Fidelity & Casualty Company vs. Randolph, (C. C. A. 6th), 78 Federal 924. The latter case was decided on the same day and by the same court as the former and in the opinion also written by Mr. Justice Harlan, the court said:

> "The words, 'voluntary and unnecessary exposure to danger,' in the contracts with the Standard Life

> & Accident Insurance Company and the Preferred Accident Insurance Company, and the words, 'voluntary exposure to avoidable danger,' in the contract with the Union Casualty & Surety Company, mean the same as the words, 'voluntary exposure to unnecessary danger,' in the contracts with the Travelers' Insurance Company and Fidelity & Casualty Company."

It will be noted that the first phrase used in the opinion, to-wit: "voluntary and unnecessary exposure to danger" is precisely the same as the phrase used in the policy in the case at bar, except for the word "and." The case of Travelers' Protective Association vs. Jones, 75 Ind. App. 29, 127 N. E. 783, to which we will later advert, conclusively shows the word "or," as contained in the policy in the case at bar, is to be construed as the word "and."

It will be noted in the Randolph case that those cases having to do with negligence are not controlling under circumstances calling for the construction of a *contract* of life insurance when construing the phrase "voluntary exposure to unnecessary danger" or a similar exception. It will further be noted that giving the phrase a literal interpretation it would still exempt an exposure by the assured "enforced by the superior will of others." Certainly reasonable minds can differ on the question as to whether or not Prinsen was subjected, under even a literal interpretation of the policy, to obvious risk of injury or to a voluntary exposure to danger, by reason of the superior will of Begaman, the driver of the truck. Just what Prinsen did or what he could have done to prevent Begaman from driving the truck upon the railroad track is unknown. Under the circumstances all presumptions are in Prinsen's favor to the effect that he did everything humanly

possible to be done to prevent the truck being driven upon the railroad track. There is enough uncertainty and there is enough doubt under the circumstances to compel the trial court to submit the cause to a jury for its determination of the fact. This we believe is the holding of the Washington court in the case of Gaches vs. Daw. 168, Wash. 162, 10 Pac. (2d), 1111, where the court stated:

> "This court has never been overnice about scrutinizing the action of one who has been placed in peril by the negligence or wrongful act of another, and it has been uniformly held that, if the minds of reasonable persons may differ as to whether the act was that of an ordinarily prudent person, the question was one for the jury."

Furthermore, the court, in the Randolph case, states that "the better reason is with the cases holding that the words 'voluntary exposure to unnecessary danger' in accident policies such as the one here in suit import a consciousness of the danger and an intention to risk the consequences of exposing ones self to it." On this phase of the case the burden was upon the insurer and not only is the record entirely silent with reference to any "consciousness of danger" on the part of Prinsen and an "intention" on his part to risk the consequences of the danger, but every presumption is in his favor to the effect that he did not realize the danger or that being conscious of it did everything possible to avoid it.

Another case which we believe to be eminently worth while in connection with this discussion because it is so closely in point is that of Travelers' Association vs. Jones, supra. The important factor in the value of that case is that it involved an action against the appellee in the case at bar and

because it was an action on a policy similar to the one herein involved. The policy contained the same phrase that we are now discussing namely: "voluntary or unnecessary exposure to danger or to obvious risk of injury." In that case the assured walked on a railroad track and was killed by a train. The court construed the phrase now under discussion and held that it was properly a question for the jury whether, under all the circumstances, the assured's death resulted from "voluntary or unnecessary exposure to danger or to obvious risk of injury."

There are many other authoritative and well-considered cases which squarely hold that going upon or crossing a railroad track, though done carelessly and without possible attention to the possibility of approaching trains, is not, as a matter of law, a "voluntary exposure" to unnecessary danger or to "obvious risk" of injury. Some of these are: Keen vs. New England Mutual Accident Assn., 161 Mass. 149, 36 N. E. 891; Badenfeld vs. Mass. Mutual Accident Assn., 154 Mass. 77, 27 N. E. 769; Walter vs. Peoples, Health & Accident Ins. Co., 173 Mich. 581, 139 N. W. 865; Duncan vs. Preferred Mutual Accident Assn., 13 N. Y. S. 620, Aff. 29 N. E. 1029; Meadows vs. Pacific Mutual Life Ins. Co., 129 Mo. 76, 31 S. W. 578; Lehman vs. Great Eastern Casualty & Indemnity Co., 158 N. Y. 689, 53 N. E. 1127.

The proposition stated by both the Randolph and Melick cases, to the effect, that negligence of the assured is not available to the insured as a defense unless the policy expressly excepts from the risk accidents due to the assured's negligence, was re-affirmed by the Fourth Circuit Court of Appeals in the case of Zurich General Accident & Liability Ins. Co. vs.

Flickinger, (C. C. A. 4th), 33 Fed. (2d) 853, in an opinion written by Judge Parker and in which the court stated:

> "Defendant also takes the position that it was negligence on the part of insured to drink what he knew was 'bootleg' whiskey; and that, this being true, his death was due to negligence and not to accidental means. But it is well settled that it is no defense to an action on an accident policy that the negligence of the insured caused or contributed to the injury, unless the policy expressly excepts from the risk accidents due to insured's negligence, which is not the case here. 1 C. J. 487, and cases cited, particularly Travelers' Ins. Co. vs. Randolph, (C. C. A. 6th), 78 Fed. 754, 762, and Travelers' Ins. Co. vs. Melick, (C. C. A. 8th), 65 Fed. 178, 27 L. R. A. 629."

It will thus be seen from the principles elaborated upon in all of the foregoing cases that in order for the death of the assured to come within the excepted risk, the assured must be conscious of and contemplate the danger and deliberately expose himself to it. It is not enough that the assured is careless or that he does things which an ordinarily prudent man would not have done under like circumstances. Otherwise, very few accident policies would be of any value at all.

A large proportion of the persons injured or killed are in accidents, and to some extent at least, through their own fault. It is these very inadvertences and mistakes that they desire to protect themselves against when they pay the premiums on their policies. The insurer on the other hand does not wish them to intentionally injure or kill themselves. We believe, however, that there is not the slightest evidence adduced by the insurer in this case tending to show that Prinsen was conscious of the danger which ultimately overtook

him, or that being conscious of it, he deliberately and premeditatedly exposed himself to it. Even if there was some evidence to this effect, it would still be a question of fact for the jury to determine under all of the circumstances.

The record is utterly barren of any proof that Prinsen knew that the truck was approaching a railroad track or if he did, that a train was approaching. He may not have been looking at all. Of course, if he was not looking, it might be negligence under the Parramore case, but it would hardly fulfill the requirement of "consciousness" of the danger which is the prime element of a voluntary exposure to it as stated in the Randolph case and other similar cases. Moreover, so far as this record is concerned, even if Prinsen did see the approaching train and did realize his danger, there is not the slightest evidence that he did not pursue an affirmative course of action in order to obviate it. He may have told the driver to stop; he may have thought from something the driver said or did that he was going to stop; he may have thought, and reasonably so, that he would not have time to jump; he may have been unable to jump. With the burden on the insurer to affirmatively negative all of these things, and more, it is difficult to see how the trial court could hold, as a matter of law, that Prinsen consciously and deliberately exposed himself to danger and obvious risk of injury. Even in the Parramore case, where only the question of negligence was before the court, one of the vital facts was that the plaintiff did and said nothing, and this fact was affirmatively proven, the language of the court on this point being as follows:

> "Mr. Thomas, who was in the automobile with him, testified that he did not see Mr. Parramore do anything. Mr. Reynolds, who sat by his side on the

> front seat said Mr. Parramore did not say a word or try to get out of the car before the engine struck it."

We emphasize, again, that even assuming Prinsen was conscious of his danger, there is nothing to show that he did not try to avoid it. We are strongly inclined to the view that with the burden of proof on the insurer as it was, the court could well have held that the insurer had introduced no substantial evidence proving or tending to prove that Prinsen had consciously and wilfully exposed himself to danger and obvious risk of injury, and yet the only thing we asked was that the matter should have been submitted to the jury. It is a startling doctrine, under the circumstances, with Prinsen paying his premiums on this accident policy for over sixteen years, that his beneficiary is precluded from having a jury pass upon the question of whether his death, admittedly accidental, was caused by his conscious and voluntary exposure to danger in a collision where there were no witnesses as to what Prinsen did or did not do immediately preceding his death.

It is submitted, therefore, that the trial court fell into error in not submitting this question to the jury.

IV.

INASMUCH AS THE ASSURED, IN HIS APPLICATION FOR THE POLICY, GAVE HIS OCCUPATION AS POWDER SALESMAN FOR THE WESTERN POWDER COMPANY, WHICH COMPANY WAS ENGAGED IN THE PURCHASE, SALE AND DISTRIBUTION OF DYNAMITE CAPS, GUN-POWDER AND DYNAMITE, AND WHICH WAS KNOWN TO THE INSURANCE COMPANY, THE COMPANY CAN NOT NOW AVAIL ITSELF OF RISKS WHICH MIGHT BE INCIDENT TO THE ASSURED'S OCCUPATION.

Even if the court should conclude that the assured was "participating" in the moving or transportation of explosives at the time of his death and should further conclude that as a matter of law the concussion of the explosion was a proximate cause of his death, or even if the court determines that his death was the result of voluntary or unnecessary exposure to danger and obvious risk of injury, we nevertheless maintain that the insurer in this case cannot avail itself of these defenses, for the reason that it knew at the time it issued Prinsen his policy, and thereafter, that he was engaged in a business which had to do with the handling of explosives. The fact probably is that the character of his occupation was one of the reasons why Prinsen applied for, and for so many years paid premiums on, an accident insurance policy. In his written application to the company he gave his occupation as a salesman of powder (R. p. 27) and attached to this application a letter on the business stationery of the Western Powder Company, (R. p. 29) his employer. At that time, and before issuing its policy, the insurer had definite knowledge that

Prinsen's occupation was connected with explosives of all sorts. They were put fairly on notice that he would be in the vicinity of explosives, and, in all likelihood, at some time or another, ride on or perhaps drive conveyances on which explosives were moved and transported. Yet despite this, the insurer agreed to indemnify the assured's wife against his death by violent, external and accidental means, and yet it buried away in the print of its policy the provision that its liability would not extend to death caused by his "participating" in the moving or transportation of explosives. We believe that under these circumstances, the insurer cannot avail itself of this clause nor can it avail itself of the clause referring to voluntary or unnecessary exposure to danger insofar as such exposure has to do with the handling of explosives or riding on a truck loaded with them. Whether the principle for which we contend here be called estoppel or waiver does not concern us. The result only is of importance. It would seem, therefore, that if the insured was killed as a result of performing his duties as an employee of the Western Powder Company, the excepted risk above referred to would not be available to the insurer as a defense.

In Cooley's Briefs on Insurance, 2nd Ed., Vol. 6, page 5295, the general rule in this connection is laid down as follows:

> "The exception of certain risks is, however, not available to the insurer if the act done or risk incurred is within the scope of or incident to the occupation of insured, so as to be fairly regarded as one of the risks assumed as a risk of the occupation."

The following cases seem to support the foregoing principle:

In the case of Standard Life & Acc. Co. vs. Schmaltz, 66 Ark. 588, 53 S. W. 49, it was stated:

> "One of the duties of Schmaltz was to remove cylinder heads, when it was necessary to be done for the purpose of repairing engines, in the course of his employment. The dangers and probabilities of accidents happening while in the discharge of that duty, doubtless, entered largely into the consideration and contemplation of the parties when the contract of insurance was made. * * * Having obtained this knowledge or notice, and entered into this agreement, the appellant, undoubtedly, became bound by the delivery of the policy to insure Schmaltz, to the extent of $2,000, against all injuries which were coused solely by external, violent, and accidental means, while he was doing lifting or making exertions which pertained to his occupation and employment. Having paid for this protection he was entitled to its benefit."

In the case of Richards vs. Travelers' Insurance Co., 18 S. D. 287, 100 N. W. 428, the court said:

> "Upon the theory that a person insured as 'a cattle dealer or broker visiting yards by occupation' may do whatever is customary among reasonably prudent men engaged in the same occupation, respondent was permitted to prove that it was the usual practice and absolutely necessary for persons thus employed to ride upon the top of cars from the chute where live stock is loaded in Sioux City to the railway yards where trains are made up, and, on account of the distance from the stockyards to the railway yards, and the great number of tracks therein, there is no other way to know the location of his cars, and get out of the city on the train into which they are taken. Modern courts very justly hold restrictions in accident policies inoperative, which render the insurance nugatory and valueless by attempting to avoid liability for injuries

> sustained by the insured while performing necessary acts embraced in his classified occupation. In the case of Dailey vs. Preferred Masonic Mutual Accident Association, (Mich.) 57 N. W. 184, 26 L. R. A. 171, the Supreme Court of Michigan denied the right of the insurer to insist upon a provision in a policy issued to a railway passenger conductor to the effect that nothing would be paid for injuries or death occasioned by an attempt to enter or leave moving conveyances using steam as a motive power * * * ."

Among other cases which we believe hold to the same effect are: Rustin vs. Standard Life & Acc. Ins. Co., 58 Neb. 792, 79 N. W. 712; International Travelers Assoc. vs. Votaw, ... Texas ..... , 197 S. W. 237; Brown, Administratrix, vs. Railway Passenger Assurance Co., 45 Mo. 222.

Petitioner issued its certificate of membership to James Prinsen knowing that he, at the time, was a powder salesman for the Western Powder Company. The letterhead of the Western Powder Company and upon which Mr. Prinsen designated his beneficiary, the appellant in this case, indicated (R. p. 29) that his employer had to do with the handling of dynamite, blasting dynamite, sporting powder, fuses, caps and electric exploders. After having accepted premiums upon the certificate of membership from 1915 to 1931, with the knowledge and upon the understanding that the assured was a powder salesman for a company engaged in the handling and, of course, the moving and transportation of explosive substances, can the petitioner be permitted to say that the assured comes within the excepted risk specified? Petitioner, with the knowledge that the assured was engaged or might be engaged in the moving or transportation of an explosive, should never have accepted his premiums over a period of

sixteen years, realizing, as it did, the incidental risks of his occupation.

CONCLUSION

In conclusion we respectfully suggest:

1. That James Prinsen, at the time of his death, was not "participating" in the moving or transportation of dynamite caps or other explosives. If it can be said that Mr. Prinsen, while riding upon the truck driven by Begaman, and over which he had no control, was "participating" in the moving or transportation of the articles that might have been upon the truck at the time, we submit that a most dangerous precedent will be made and that such a ruling can be carried to a ridiculous extreme.

2. Assuming, for the purpose of argument, that the assured at the time of his death was "participating" in the transportation or moving of the dynamite caps, there is not a scintilla of evidence that the participation in the moving or transportation of the dynamite caps caused or resulted in the death of the assured. Unless the affirmative was made to appear by the petitioner and sustained by a preponderance of the evidence, the trial court erred in directing a verdict in favor of the petitioner. There being no evidence on the subject, it most certainly could not be said that petitioner had sustained its burden in this respect.

3. That the proximate cause under the record in this case was the collision between the truck and the train and not the explosion, and that a verdict ought to be, under the record in this case, directed for the plaintiff, or at any rate submitted to the jury.

4. That, where there are two causes, so intermingled that it cannot be determined which produced the injury or death of the assured, that the policy will be held to cover the risk.

5. To come within the execepted risk, that the assured's death was caused by a result "of voluntary or unnecessary exposure to danger or to obvious risk of injury" petitioner can not rely upon the doctrine of negligence, but must affirmatively show that the assured was in danger, conscious of it, and intentionally risked the consequences of exposing himself to it. The record is also silent in this respect.

6. Petitioner accepting the assured's premiums for a period in excess of sixteen years, knowing that he was engaged in the handling, sale, distribution, moving and transportation of explosive substances as an employee of the Western Powder Company, cannot be heard to say that a risk incident to such employment is excepted under its policy, assuming, of course, only for the purpose of argument, that such was the case.

7. The ground of petitioner's motion for a directed verdict being based only upon the proposition that the assured was "participating" in the moving or transportation of an explosive substance at the time of his death, and that he voluntarily and unnecessarily exposed himself to danger or to obvious risk of injury, in riding upon the truck driven by Begaman, and there being no evidence in the record to support such contentions, and the petitioner failing to sustain the burden of proof in those respects or on any other matter which might constitute a defense to respondent's claim, the trial court erred in directing a verdict in favor of the peti-

tioner and against the respondent and that the Circuit Court of Appeals was correct in its decision reversing the trial court.

Respectfully submitted,

JOSEPH H. PETERSON

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of Counsel

CORRECTED COPY pp. 3, 4 + dissent

SUPREME COURT OF THE UNITED STATES.

No. 429.—October Term, 1933.

The Travelers Protective Association of America, Petitioner, *vs.* Uluetta Prinsen. } On Writ of Certiorari to the Circuit Court of Appeals for the Tenth Circuit.

[March 5, 1934.]

Mr. Justice Cardozo delivered the opinion of the Court.

James Prinsen when he died was a member of the petitioner, a fraternal benefit association, incorporated under the laws of Missouri. By his certificate of membership, benefits in case of death were payable to his wife, Uluetta Prinsen, the respondent in this court. The payment to be made to her in the event of death by accident was $5,000, unless the accident occurred while the member was engaged in enumerated activities. Death suffered in such circumstances was excluded from the coverage. By the terms of the certificate the association was not to be liable if disability or death occurred "when a member is participating . . . in the moving or transportation of gunpowder, dynamite, or other explosive substance or substances."[1]

[1]The full text of the exception follows: "This Association shall not be liable to a member or his beneficiary for any disability benefits, special loss benefits or death benefits, when the disability, special loss, or death of a member occurs under any of the following conditions or circumstances; when inflicted by a member on himself, while sane or insane; when there are no visible marks of injury upon the body (the body itself not being deemed such a mark in case of death); when or while a member is in any degree under the influence of intoxicating liquor or liquors or of any narcotic or narcotics; when caused wholly or in part by reason of or in consequence of the use of intoxicating liquor or liquors or the use of any narcotic or narcotics; when caused wholly or in part by any bodily or mental infirmity or disease, dueling, fighting, or wrestling; when or while a member is acting as a sailor or soldier or is participating in war or riot; when or while a member is acting as an aviator or balldonist or is participating in aerial navigation or aeronautics of any kind either as a passenger, operator or assistant; when a member is participating in public or agreed automobile racing, or in wrecking, mining, blasting, or in the moving or transportation of gunpowder, dynamite, or other

At the time of his death Prinsen was an officer of the Western Powder Company, which had an office in Salt Lake City, Utah, and a powder magazine outside the city limits. The Tintic Powder and Supply Company gave an order to the Hercules Powder Company for 300,000 dynamite caps, and the Hercules company asked the Western company to fill the order. The request was received by Prinsen, and with it a notice that within a few days the Hercules representative, Begaman, would come to Salt Lake City to accept delivery. On February 3, 1931, Begaman appeared at the Western office with a motor truck in which he was to carry the explosives. He and Prinsen then drove to the magazine beyond the city. The magazine was opened with a key which Prinsen had brought with him, and delivery of the caps was made by piling them in boxes on the truck. The two men then boarded the truck again to go back to the Western office, Begaman driving the car, and Prinsen sitting beside him on the box. A small additional payment was made by Hercules to Western for the trip to the magazine, but Tintic, not Hercules, was the owner of the truck. On the way back, the truck was in collision with an engine while crossing the tracks of the Denver and Rio Grande Railroad. There was an immediate explosion, in which the truck was destroyed and Prinsen was blown to pieces. Begaman and the railway engineer were killed at the same time.

The respondent brought suit on the membership certificate to recover the benefits payable in the event of death by accident. The association defended on the ground that the member was killed while "participating" in the transportation of explosives. In the District Court a verdict was directed in favor of the defendant. The Court of Appeals reversed, one judge dissenting. 65 F. (2d) 841. This court granted certiorari to resolve a possible conflict with other federal decisions. *Pittman* v. *Lamar Life Insurance Co.*, 17 F. (2d) 370; *Head* v. *New York Life Insurance Co.*, 43 F. (2d) 517.

We assume in favor of the respondent that "participation" in the carriage of explosives imports something more than the pres-

explosive substance or substances; when a member is murdered; when resulting from hazardous adventure or an altercation or quarrel; when there is a disappearance of a member; when the result of voluntary over-exertion (unless in a humane effort to save a human life); when the result of voluntary or unnecessary exposure to danger or to obvious risk of injury."

ence of the assured in the vehicle of carriage. One who becomes a passenger in an aeroplane may thereby participate in aeronautics (cf. *Head* v. *New York Life Insurance Co., supra; Bew* v. *Travelers Insurance Co.*, 95 N. J. Law 533; *Pittman* v. *Lamar Life Insurance Co., supra*), but it does not follow that he participates in the carriage of the mails, and this though the plane to his knowledge is in part devoted to that use. One who travels in a sleeping car does not participate thereby in the movement of explosives, though information is brought home to him that in a baggage car forward explosives are in transit. But Prinsen's relation to this enterprise was not so remote or passive as the relation of the passenger in the cases just supposed. He had gone upon a truck which had been specially devoted by its owner to the transportation of explosives, and had gone there for the very purpose of making transportation possible. The respondent would have us split into separate parts a transaction that is unitary in aim and essence. Plainly the assured was facilitating the delivery of explosives in traveling with Begaman to the suburban magazine. Plainly he was still engaged in and about a like service when he opened the magazine and placed the caps upon the truck. But his participation in the errand did not end abruptly then and there. The return journey to his office had the same motive and occasion that induced the journey out. It was not an adventitious incident that there ~~was dynamite~~ in the truck when he left the magazine. To the contrary, it was part of the plan from the beginning that the truck should take him out, and then, when laden, take him back. To say that he was riding on the truck "while" explosives were transported is to state but half the case. The case is rather this, that he was riding on the truck "because" explosives were transported. If he had not known in advance that ~~there was dynamite~~ to be carried, he would not have stirred out of his office. There was a relation more intimate than contiguity in time or space between his presence on the truck and the presence of the ~~dynamite~~: The relation was no accident; it was pre-ordained and causal.

The respondent tells us that the assured at the time of the collision was a voluntary guest, and makes much of the label. The payment or non-payment of a fare has little, if any, bearing upon the problem to be solved, yet the label, unless scrutinized, may

have capacity to mislead. In his relation to this enterprise, Prinsen was more than a voluntary guest. He was a business "invitee", riding out and back at the invitation of the owner because of a business interest common to them both. *Bennett* v. *Railroad Company*, 102 U. S. 577, 582, 584; *Heskell* v. *Auburn, L., H. & P. Co.*, 209 N. Y. 86; *Haefeli* v. *Woodrich Engineering Co.*, 255 N. Y. 442, 448; *Indermaur* v. *Dames*, L. R. 1 C. P. 274; American Law Institute, Restatement of Torts, Tentative Draft, No. 4, §§ 202, 213. We may see the case more clearly if we ask ourselves the question whether Begaman would have been free to leave the "guest" at the magazine after delivery of the ~~dynamite~~, and refuse to bring him home. Plainly not, without breach of duty to the Tintic company, the employer, which had sent the car out with instructions to the driver to carry Prinsen back. The result is all one whether the instructions in respect of carriage were tacit or express. By reasonable implication, the return trip as well as the outward one was within the orbit of the errand. *Cudahy Packing Co.* v. *Parramore*, 263 U. S. 418, 426; *Bountiful Brick Co.* v. *Giles*, 276 U. S. 154, 158; *Voehl* v. *Indemnity Insurance Co.*, 288 U. S. 162.

The argument is made that a causal connection between the death and the explosion is not a necessary inference from the facts in evidence. The assured was blown to pieces, the fragments of his body being so small that an autopsy was impossible. We are told that even so the impact of the engine may have been fatal without more. The contract does not say that the holder of the policy is to have no claim against the insurer if he dies "by reason of" his participation in the carriage of explosives. The contract says that he is to have no claim against the insurer if he dies "when" he is participating in the carriage of explosives, just as it provides for a like result when he is acting as a sailor or a soldier, or is participating in war or riot, or is under the influence of narcotics or of intoxicating liquors.[2] Courts of high au-

[2] A nice discrimination is maintained throughout the policy in suit between causes of the casualty and aggravations of the hazard. Thus, liability is excluded when the accident is "the result" of voluntary overexertion, or "the result" of voluntary or unnecessary exposure to danger, or when "caused" by any bodily or mental infirmity or disease. There is no such insistence upon a causal sequence when the insurer is participating in a war or a riot, or in aeronautics or in the transportation of explosives.

thority have held that in policies so phrased there is no need of any causal nexus between the injury or death and the forbidden forms of conduct.[3] While the proscribed activity continues, the insurance is suspended as if it had never been in force. Other courts prefer the view that to work such a suspension, there must have been an aggravation of the hazard to which death or injury was owing.[4] In that aspect the insurer might be liable if the insured had fallen from the box while asleep or inattentive, the dynamite caps remaining unexploded in the truck. So, policies excluding liability while the assured is doing an act in violation of the law have been read as directed to acts that aggravate the danger, with the result that liability is unaffected by violation of the Sunday laws or of the laws against profanity. See the cases cited in note 4, *supra*.

In so far as these readings of the policy diverge, there is no need to choose between them for the decision of the case at hand, nor to search for a formula that may have capacity to reconcile them. If the first meaning is accepted, the controversy ends. If the second is accepted, it is still clear beyond debate that the effect of the forbidden act was to magnify the risk of death in the event of a collision, to aggravate the danger in the very event that happened. Less than this may be required to relieve the insurer of liability, but surely nothing more.

The good sense of this construction of the policy has illustration in the case before us. At the very least the explosion was a concurrent cause of death, if not indeed the sole one. The policy does

[3]Order of United Commercial Travelers of America *v.* Greer, 43 F. (2d) 499; Flannagan *v.* Provident Life & Accident Insurance Co., 22 F. (2d) 136; Murdie *v.* Maryland Casualty Co., 52 F. (2d) 888; Shader *v.* Railway Passenger Insurance Co., 66 N. Y. 441; Conner *v.* Union Automobile Insurance Co., 122 Cal. App. 105; Bradshaw *v.* Farmers & Bankers Life Insurance Co., 107 Kan. 681; Order of United Commercial Travelers *v.* Tripp, 63 F. (2d) 37. Cf. United States Fidelity & Guaranty Co. *v.* Guenther, 281 U. S. 34; Matter of Metropolitan Life Insurance Co. *v.* Conway, 252 N. Y. 449, 452.

[4]Matthes *v.* Imperial Accident Association, 110 Iowa 223; Bradley *v.* The Mutual Benefit Life Insurance Co., 45 N. Y. 422; cf. Jones *v.* United States Mutual Accident Ass'n, 92 Iowa 652; Accident Insurance Co. *v.* Bennett, 90 Tenn. 258; Murray *v.* New York Life Insurance Co., 96 N. Y. 614; Benham *v.* American Central Life Insurance Co., 140 Ark. 612; Kelly *v.* Fidelity Mutual Life Insurance Co., 169 Wis. 274, 276; Bloom *v.* Franklin Life Insurance Co., 97 Ind. 478; Cluff *v.* M. B. Life Insurance Co., 13 Allen 308.

not mean that in the event of a proscribed activity there shall be a segregation of causes operating in unison and a distribution of the consequences assignable to each. One of the essential purposes to be served by the limitation of the risk is to put an end to such a process of dissection and comparison. By the form of its policy the insurer has given notice to assured and beneficiary that it will refuse to become entangled in these mystifying subtleties. At the moment of the casualty the insurance was suspended by an aggravation of the hazard, and suspended it remained till the forbidden hazard was removed.

The judgment of the Court of Appeals is reversed and that of the District Court affirmed.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 429.—October Term, 1933.

The Travelers Protective Association of America, Petitioner, *vs.* Uluetta Prinsen.	On Writ of Certiorari to the Circuit Court of Appeals for the Tenth Circuit.

[March 5, 1934.]

Mr. Justice Stone.

I think the judgment should be affirmed.

If "participation" means cooperation in the transportation more than is involved in presence on the transporting vehicle, with the knowledge that dynamite is being carried, I can perceive no ground for saying that there was participation here. That deceased had made the journey to deliver the dynamite and, as a "business invitee", had a right to return on the vehicle on which he had placed it, seems to me as irrelevant as though the deceased had embarked as a passenger on a railroad train on which the explosion occurred after he or his firm had shipped dynamite upon it. By the terms of the policy participation, to exclude liability, must be at the time of the injury. After the return journey began, deceased did nothing to facilitate the transportation. He neither controlled nor had the right to control it. He was merely present. The distinction drawn between this case and that of mere presence, so difficult of statement and application, appears to me to obscure rather than to define the meaning of the term and to violate the cardinal principle that, so far as their language reasonably admits, insurance contracts are to be interpreted most favorably to the insured.